No. 88-1181

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

CRYSTAL CUNNINGHAM per next friend ROBERT RUBY CUNNINGHAM, and ASHLEY JOHNSON per next friend LARRY JOHNSON,
Petitioners,

v.

HARRY J. BEAVERS, Superintendent of Schools, Jacksonville Independent School District, MARY SUE BRUNO, Principal, Westside Kindergarten School, ROSA COOK, teacher, Westside Kindergarten School, TONY BOLTON Chairman, Jacksonville Independent School District Board of Trustees,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether shocking to the conscience, unreasonable and disproportionate public school corporal punishment may state a Section 1983 claim for violation of the Fifth and Fourteenth Amendment substantive due process liberty interest when there is a state tort or criminal cause of action?

2. Whether preemption of the abovementioned constitutional claim by state tort or criminal "remedy" violates the Supremacy Clause of the United States Constitution?

3. Whether preemption of the abovementioned constitutional claim by state tort or criminal "remedy" is a violation of the First, Fifth and Fourteenth Amendments vis a vis deprivation of the right to redress, deprivation of the liberty interest, and violation of the Equal Protection Clause?

4. Whether corporal punishment in public schools violates the Equal Protection Clause of the Fourteenth Amendment when there is no showing that it is

   (a) rationally related to,
   (b) fairly and substantially related to, and/or
   (c) compelled by

the goal of public school education?

5. Whether a state statute that authorizes corporal punishment "up to deadly force" to maintain order in any public school, including kindergarten and nursery school, is overly broad and violative, on its face, of the Equal Protection Clause, and the due process clause of the Fifth and Fourteenth Amendments?

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HARRY J. BEAVERS, Superintendent of Schools, Jacksonville Independent School District, MARY SUE BRUNO, Principal, Westside Kindergarten School, ROSA COOK, teacher, Westside Kindergarten School, TONY BOLTON Chairman, Jacksonville Independent School District Board of Trustees,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners Crystal Cunningham, per next friend Robert Ruby Cunningham, and Ashley Johnson, per next friend Larry Johnson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on October 26, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 858 F.2d 269 (5th Cir. 1988), and is preprinted in the appendix hereto, *infra*, p. A-1.

The opinion of the United States District Court for the Eastern District of Texas, Tyler Division (Justice, J.) has not been reported. It is reprinted in the appendix hereto, *infra*, p. C-1.

JURISDICTION

The date and time of entry of judgment sought to be reviewed herein is October 26, 1988. *See infra*, p. A-1, and *infra*, p. B-1.

The statutory provision conferring jurisdiction on this Court to review the decision in question by writ of certiorari is 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Article IV[2]

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, under the Authority of the Unites States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

United States Constitution, First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the Disctrict of Columbia."

42 U.S.C. Section 1985

See full text in Appendix D, *infra*, p. D-1.

42 U.S.C. Sections 5101-07

See full text in Appendix G, *infra*, p. G-1

Texas Codes Annotated, 1973 Revision, Penal Code, Vol.1
Section 9.62, Educator-Student

"The use of force, but not deadly force, against a person is justified:

(1) if the actor is entrusted with the care, supervision, or administration of the person for a special purpose; and

(2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group."

STATEMENT OF THE CASE

After being beaten with a wooden paddle by the public kindergarten teacher and principal to the point where the "blows left pronounced bruises across the backsides of both children" (*infra*, p. C-2) and physician and social workers termed it "awful" and "child abuse" (*infra*, p. E-3), five- and six-year-old public kindergarten pupils Crystal Cunningham and Ashley Johnson, Petitioners, brought suit in United States District Court for violation of their Fifth and Fourteenth Amendment substantive and procedural due process rights, and for violation of the Equal Protection Clause, under 42 U.S.C. Section 1983, and under 42 U.S.C. Section 1985 for conspiracy to intimidate from testifying in Federal court. Jurisdiciton of the District Court was predicated upon 28 U.S.C. Sections 1331 and 1343, and the above Constitutional and statutory provisions.

Respondents were individually named and sued. Their actions by beating and allowing the kindergarten children to be beaten, for the alleged offense of "snickering", were committed

under "color of law" as they were cloaked with state authority respectively as teacher, principal and supervisory personnel. (*infra*, pp. E-1 – E-2.)

The principal and teacher administered the blows and the other two defendants acquiesced and failed to take action against the abuse. (*Infra*, pp. E-2 – E-4.) The severity of the beating with the wooden paddle served as intimidation from testifying in Federal court.

"Each child missed six days of school [due to pain] and remained frightened and tearful about attending the institution." (*Infra*, p. C-2.)

The complaint alleged severe pain, humiliation, and physical and mental harm. (*Infra*, p. E-3.)

The complaint also alleged that Respondents' acts were excessive, brutal, disproportionate to the circumstances, shocking to the conscience and constituted intentional disregard for Petitioners' rights as aforestated and their physical and emotional well-being. (*Infra*, p. E-3.)

On February 29, 1988, the District Court granted Respondents' Rule 12(b) (6), F.R.C.P., motion to dismiss for failure to state a claim on all counts, considering itself bound by Fifth Circuit precedent in *Coleman v. Franklin Parish Board*, 702 F.2d 74 (5th Dir. 1983) and *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (*en banc*) *aff'd on other grounds*, 430 U.S. 651 (1977). (*Infra*, p. C-2.) The Equal Protection claim was dismissed because *Ingraham* "presupposes" corporal punishment is rationally related to education. Various state pendent tort claims were dismissed with the above.

Petitioners perfected their appeal to the Court of Appeals for the Fifth Circuit in timely fashion. (*Infra*, p. E-5.)

Appeal to the Fifth Circuit was premised upon violation of the substantive due process liberty interest and the Equal Protection Clause.

In denying the liberty interest claim, the Court of Appeals for the Fifth Circuit stated that *even if* the force is "unreasonable and/or disproportionate" ("up to deadly force" under Texas law, *infra*, p. 18) state tort or criminal remedy precludes redress for violation of this Constitutional right. (Petitioners argue herein that the Supremacy Clause of the United States Constitution and their right to redress in court as protected by the First Amendment are likewise abridged by this bold and far-reaching decision of the Fifth Circuit Court of Appeals in *Cunningham*.)

The Equal Protection claim was denied because the Court of Appeals assumed that corporal punishment "up to deadly force" in the classroom, or kindergarten or public nursery school, is required to maintain order and to further the goal of education. The Court of Appeals refused to look at children as an "at risk" group, or to recognize an "important right" or a "fundamental right" involved so as to employ the "fair and substantial" or "strict scrutiny" tests. Under the "rational basis" test, the Court of Appeals found that any kind of force "up to deadly force" in public school, which necessarily includes public kindergartens and nursery schools, is rationally tied to the education of students, including five- and six-year-old pupils.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT'S DENIAL OF THE SUBSTANTIVE DUE PROCESS CLAIM FOR SHOCKING TO THE CONSCIENCE, UNREASONABLE AND DISPROPORTIONATE PUBLIC SCHOOL CORPORAL PUNISHMENT IS IN DIRECT CONFLICT WITH OTHER FEDERAL COURTS OF APPEALS ON THE SAME ISSUE.

In fact, now four Circuits have expressed *four different* and conflicting views on the scope of protection afforded public school children under the substantive due process clause of the Fifth and Fourteeth Amendments. This incredible disarray of Federal Circuits, affecting the constitutional rights of virtually all public school children in this country, ranges from:

(i) the Fifth Circuit's absolute refusal to recognize a substantive due process claim stemming from excessive corporal punishment (*Ingraham v. Wright, supra*, and the most recent affirmation thereof in *Cunningham v. Beavers, infra*, p. A-1);

(ii) to the Fourth Circuit's recognition of the claim by a three-fold showing: sufficiently severe intentional force, disproportionate to the need presented, with a malicious state-of-mind requirement (*Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980));

(iii) to the Tenth Circuit's recognition of the claim by a showing of sufficiently severe intentional force, disproportionate to the need presented, without the malicious state-of-mind requirement (*Garcia By Garcia v. Miera*, 817 F.2d 650, 655 fn. 7 (10th Cir. 1987), *rehearing and rehearing en banc denied* (1988), *cert. denied*, 108 S.Ct 1220 (1988));

(iv) to the Third Circuit's recognition of the claim by a showing of sufficiently severe force, disproportionate to the need presented, but without the intent and malicious state-of-mind requirements, substituting in place thereof the lesser standard of "gross negligence or recklessness" (*Metzger By And Through Metzger v. Osbeck*, 841 F.2d 518, 520 fn. 1 (3rd Cir. 1988)).

The Court of Appeals for the Fifth Circuit in *Cunningham v. Beavers, infra*, p. A-8, holds that even

> [i]f the spankings . . . were unreasonable and/or disproportionate to their offense . . . [, since] plaintiffs would be entitled to relief under Texas common law [,] *** we find that plaintiffs have not stated a claim of deprivation of [substantive] due process.

This most recent Fifth Circuit decision on the issue of excessive public school corporal punishment declares that there will be no Federal court relief, no Federal scrutiny for violation of the Fifth and Fourteenth Amendment liberty interest in states providing state tort or criminal remedy, no matter how capricious or shocking to the conscience the abuse may be.

Cunningham does not turn on the relative severity of application of physical force. It sweeps in all levels of shocking to the conscience abuse along with the beatings of kindergarten girls as alleged in this case. In its decision, the Court of Appeals for the Fifth Circuit cited, as illustrative of an even more extreme example for which state tort or criminal action would provide adequate and exclusive remedy, a public school punishment causing severe cervical sprain and bruising of the brachial plexus, necessitating eight days in the hospital and several months to recover. See *Hogenson v. Williams*, 542 S.W. 2d 456 (Tex. 1976) cited in *Cunningham, infra*, p. A-7. *Cunningham v. Beavers* necessarily includes broken backs and spinal cords, permanent paralysis, and even death, none of which would trigger a constitutional claim for violation of the precious liberty interest.

The Court of Appeals for the Fifth Circuit's decision in *Cunningham* is based entirely upon their being a state tort or criminal "remedy". The case is premised upon, reaffirms and solidifies its earlier holding in *Ingraham v. Wright, supra*, p. 917, whereby it

> refused to look at each individual instance of punishment to determine if it had been administered arbitrarily or capriciously. We think it is a misuse of our judicial power to determine, for example,.

> whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has *excessively* punished a child. (Emphasis supplied.) plied.)

But when a public school child crosses the borders of the Fifth Circuit into the Third Circuit, or the Fourth Circuit, or the Tenth Circuit, there *is* redress, although with varying threshold tests applicable. *See Metzger By And Through Metzger v. Osbeck, supra, Hall v. Tawney, supra*, and *Garcia By Garcia v. Miera, supra.*

It should be noted that a constitutionally protected right with no avenue of relief, as is the case in the Fifth Circuit here, is tantamount to stripping United States citizens of a constitutionally protected right within that jurisdiction. A right without a remedy is not only a hollow right, it is no right at all in practicality.

There is even authority for this conflict between the Circuits. "[A] direct conflict exists between the Fourth Circuit . . . and the Fifth Circuit." *Garcia By Garcia v. Miera, supra,* p. 658. To that should be added the Third and Tenth Circuits, as well as a direct conflict between the Court of Appeals for the Fifth Circuit's opinion in *Cunningham* and the United States Constitution, Fourteenth Amendment, Section 1, whereby:

> No state shall make or enforce any law which shall . . . deprive any person of . . . liberty . . . without due process of law . . . .

The Court of Appeals for the Fifth Circuit has declared that state tort or criminal remedy precludes any avenue of relief for violation of the Fifth and Fourteenth Amendment liberty

interest in excessive corporal punishment cases, which now becomes a direct deprivation by state law whereby the state claim appropriates the Federal constitutional claim. *See also* discussion on Supremacy Clause, Equal Protection and First Amendment deprivations, *infra*.

The Court of Appeals for the Fifth Circuit's opinion in *Cunningham* flies in the face of well established legal principle and departs from the teachings of this Court, that exhaustion of state or administrative remedies is not a prerequisite nor do such avenues of relief preclude civil rights actions in Federal court seeking monetary damages. *See Davidson v. O'Lone*, 752 F.2d 817 (3rd Cir. 1984) (*en banc*), *Owen v. City of Independence*, 445 U.S. 622 (1979), *McNeese v. Board of Education*, 373 U.S. 668 (1963), *Monroe v. Pape*, 365 U.S. 167 (1961), *Steffel v. Thompson*, 415 U.S. 452 (1973), and *Patsy v. Florida*, 457 U.S. 496 (1981).

If this Court were to interpret *Cunningham* differently and center instead on the level of force and injury, the second spanking with a wooden paddle in *Garcia By Garcia, supra*, was of the same severity as in *Cunningham*. In *Garcia By Garcia* there were severe bruises to the buttocks, statement by the physician that he had not seen such bruises from routine spankings, and a statement by the nurse that she would have called Protective Services had the bruises come from the home. *Garcia By Garcia, supra, p. 653.*

In the case at bar, the educators likewise used a wooden paddle and left black and blue marks and bruising on the buttocks. (*Infra*, p. E-3.) "The blows left pronounced bruises across the backsides of both children." (*Infra*, p. C-2.) A physician stated that the paddling was "too hard", and social workers at the Child Welfare Office stated that the situation clearly constituted "child abuse". (*Infra*, p. E-3.) "Each child missed six days of school [due to pain] and remained frightened and tearful about attending the institution." (*Infra*, p. C-2.)

Missing from the Court of Appeals for the Fifth Circuit's opinion in *Cunningham* was the physician's further statement that the spanking was "awful." *See* excerpt from Brief for Apellants, Appendix E, *infra*, p. E-3 . The Court or Appeals also left out of its decision the social workers' further reference to the teachers as "child abusers," *infra*, p. E-3 , and the Petitioners' allegations of "excessive, brutal disproportionate to the circumstances, and shocking to the conscience" actions. (*Infra*, p. E-3.)

In *Garcia By Garcia, supra*, ten-year-old Teresa Garcia stated a constitutional claim for deprivation of her liberty interest. In *Cunningham*, five- and six-year-old Crystal Cunningham and Ashley Johnson could not state such a claim for deprivation of their constitutional rights under essentially the same set of facts.

The Court of Appeals for the Fifth Circuit has pronounced to our young citizens that "one nation indivisible, with liberty and justice for all," *The Pledge Of Allegiance To the United States Flag*, is untrue. Constitutional rights vary, depending upon which state one attends public school in. The Court of Appeals for the Fifth Circuit, especially with its broad stroke necessarily eliminating the constitutional claim in any and all circumstances, proclaims that liberty is divisible, and is not for all.

II. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT'S PRECLUSION OF THE CLAIM FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS ON THE BASIS OF THERE BEING A STATE TORT OR CRIMINAL REMEDY SO FAR DEPARTS FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS (VIS A VIS VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION AND THE CLEAR AND EMPHATIC HOLDINGS OF THIS COURT THAT SECTION 1983 CLAIMS FOR SUBSTANTIVE RIGHTS DO

NOT DEPEND ON POST DEPRIVATION STATE REMEDY) AS TO CALL FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION

This Court has clearly and emphatically pronounced that "[w]hen federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) . . . exhaustion of state judicial or administrative remedies [is not required], recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. *See, e.g., McNeese v. Board of Education,* 373 U.S. 668 (1963); *Monroe v. Pape,* 365 U.S. 167 (1961)." *Steffel v. Thompson, supra,* pp. 472-73. *See also Patsy v. Florida, supra,* "this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position . . . ." *Id,* p. 501.

"[T]he viability of . . . § 1983 actions does not depend on whether or not a postdeprivation remedy is available in state court." *Davidson v. O'Lone, supra,* p. 828. If it did "[s]uch an interpretation would deprive § 1983 of its original remedial purpose to "aid [in] the preservation of human liberty and human rights . . . . " *Id. See also Owen v. City of Independence, supra,* p. 636, to the effect that uniform and liberal redress should be afforded in preserving human liberty and rights.

In addition to the Court of Appeals for the Fifth Circuit's major departure from this Supreme Court's holdings, the Supremacy Clause of the United States Constitution is likewise violated (*see* further discussion of the Supremacy Clause *infra*) requiring exercise of this Court's power of supervision to rectify this blatant departure.

III. THE FIFTH CIRCUIT'S DENIAL OF THE SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAIMS FOR EXCESSIVE PUBLIC SCHOOL CORPORAL PUNISHMENT INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW AND RAISES VITAL ISSUES CONCERNING FEDERAL COURT SCRUTINY OF PUBLIC SCHOOL DISCIPLINARY DECISIONS WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Substantive Due Process.

In *Ingraham v. Wright, supra*, this Court expressly stated that it had no occasion to consider "whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate rights under the Due Process Clause," 430 U.S. 651, 679, fn. 47 (1877).

This Court has not decided this important question presented for review previously in *Ingraham v. Wright, supra,* and in *Garcia By Garcia*, supra.

The liberty interest of public school children involves vital issues concerning Federal court scrutiny of public school disciplinary decisions. An estimated 1.5 million children are punished physically in public schools every year, *Newsweek*, June 22, 1987, p. 61.

Robert E. Fathman, Ph.D., Chairman of the National Coalition to Abolish Corporal Punishment in Schools, which organizaiton includes the American Bar Association, the American Medical Association, the National Education Association, the National P.T.A., the American Academy of Pediatrics, the National Commission for the Prevention of Child Abuse, the National Association of School Psychologists, the American Psychiatric Association, the Child Welfare League of America, and the National Mental Health Association, (January 6, 1989 Quotation, Personal Communication) states that:

> Based upon studies, and data from the U.S. Department of Education, it is estimated that 30,000 American school children are physically injured each year by

> teachers in public schools because of the infliction of corporal punishment, to a degree that requires medical treatment. At least 100,000 children develop emotional and learning disabilities from excessive and inappropriate school punishment each year.

The same acts of excessive punishment may implicate substantive due process rights in the Third, Fourth and Tenth Circuits, but will be dismissed out of court in the Fifth Circuit. Resolution of this conflict will help determine the extent to which public school disciplinary decisions will be subjected to, or afforded Federal court scrutiny.

By granting review to resolve this conflict among the circuits, the Court has the opportunity once again to address issues which are fundamental to school officials, students and parents alike throughout the country. Review of this case will also serve the extremely important purpose of determining what standard defines the violation, thereby providing sorely needed guidance to public school officials and to the lower Federal courts.

B. Supremacy Clause.

The effect of the Court of Appeals for the Fifth Circuit's decision in *Cunningham*, which denies the constitutional claim for violation of the liberty interest in cases of "unreasonable and/or disproportionate" public school corporal punishment, when there is state tort or criminal remedy, is preemption by state law of the protection afforded under the due process of the Fifth and Fourteenth Amendment of the United States Constitution. Under *Cunningham*, state law becomes the supreme and exclusive remedy in violation of the Supremacy Clause of the United States Constitution, Article VI [2], which provides as follows:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all Treaties made, under the Authority of the United

> States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

This elevation of state law over 42 U.S.C. Section 1983 and the due process protections of the Fifth and Fourteenth Amendments to the United States Constitution constitutes a serious and vital issue of constitutional law which has not been, but should be, resolved by this Court.

C. First Amendment.

See discussion of First Amendment right to redress in courts, vis a vis state law appropriation of the constitutional claim for violation of the liberty interest incorporated in the Equal Protection "strict scrutiny" discussion below.

D. Equal Protection.

Under the "strict scrutiny" test, the "fair and substantial relation" test, and the "rational relation" test Petitioners have been denied equal protection of the laws as protected by the Equal Protection Clause of the Fourteenth Amendment.

1; *The "strict scrutiny" test.*

Because *Cunningham v. Beavers* deprives public school children within the Fifth Circuit of any and all constitutional remedy for violation of their liberty interest at the hands of public school teachers in those states within the Fifth Circuit where there is state tort or criminal relief, *and because Cunningham is based upon there being a state claim*, the Court of Appeals for the Fifth Circuit has in essence declared that the applicable state common law, tort claims act or criminal statute preempts, appropriates and deprives United States citizens of their constitutional right to liberty while in public school in said jurisdiction. Such state laws within the Fifth Circuit constitute *de facto* state deprivations now of two very substantial, fundamental and constitutionally protected rights, namely the First

Amendment right to redress through access to courts for violations of the Fifth and Fourteenth Amendment liberty interest in public school excessive corporal punishment cases, and the Fifth and Fourteenth Amendment substantive due process liberty interest itself, thus kicking in the "strict judicial scrutiny" test vis a vis *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33 (1973), and the necessity of a "compelling state interest" for corporal punishment in public school, at least when said punishment rises to an "unreasonable and/or disproportionate to the offense" level. *See also Plyler v. Doe*, 457 U.S. 202, 217 (1981).

(2) *The "fair and substantial relation" test.*

Children should be an "at risk" group as are women and aliens. Minors cannot "affect their own status": they are powerless in our society compared to adults. *See Trimble v. Gordon*, 430 U.S. 762, 760 (1977), and *Plyler v. Doe, supra*, p. 220. Reflecting recognition of this vulnerability, and how children may be taken advantage of in our society, the United States Congress has bolstered state action on child abuse by enacting the Child Abuse Prevention and Treatment Act which established the National Center for Child Abuse and Neglect within the United States Department of Health and Human Services. *See* 42 U.S.C. Sections 5101-07, *infra*, p. G-1.

According to recent studies more than one million children are abused in the United States annually. *The New York Times*, January 4, 1986, p. 42, Col. 3.

If children are an "at risk" group, the Court has an obligation to examine carefully the ends and means of the legislation. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting).

Moreover, if education is implicated, an "important right" is implicated, and a "fair and substantial" relationship must

be shown between the use of corporal punishment and the goal of education. *Plyler, supra,* pp. 221-23.

There has been no such showing in *Cunningham.* In fact the only showing has been by *Petitioners* that corporal punishment *is not effective* and that it is detrimental to educational goals.

The common law justification of the privilege to inflict corporal punishment is supposed to be education. *Ingraham v. Wright, supra.* This has been shown to be irrational and counterproductive by modern research. Because the legislation is irrational, it should be stricken as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Empirical research refutes the stated efficacy of this method of classroom discipline and education. "Beating Children is as American as Apple Pie," Cohen, *Human Rights* 24 (1978). *See also, Corporal Punishment in American Education,* Hyman and Wise, and the NEA *Report on the Task Force on Corporal Punishment* (1972).

Studies show that corporal punishment has a negative effect on learning. *See* "The Effect of Punishment on Academic Achievement: A Review of Recent Research," Lambeth, *Corporal Punishment in American Education,* pp. 74-80; and "The Influence of Corporal Punishment on Learning: A Statistical Survey," Wallerstein and Maurer, 12 *The Last Resort* 18 (Fall 1983). Correlation studies have shown a relationship between the corporal punishment of children and their approval of violence as adults. "The Social Structure of Violence in Childhood and Approval of Violence as an Adult," Owens and Straus, *Corporal Punishment in American Education.* Similar studies relate corporal punishment of children to their adult behavior as child and spouse abusers. "The Battered Child Syndrome," Kemp, 18 *Journal of A.M.A.* 17 (1962).

Hypothetical adminsitrative reasons do not provide justification when applying the "fair and substantial relation" test. *Hampton v. Mow Sun Wong,* 426 U.S. 88, 116 (1975).

The Texas enabling statute that permits educators to use corporal punishment with any kind of force "up to deadly force" reads as follows:

> Section 9.62, Educator-Student
>
> The use of force, but not deadly force, against any person is justified:
> (1) if the actor is entrusted with the care, supervision, or administration of the person for a special purpose; and
> (2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group. Texas Codes Annotated, 1973 Revision, Penal Code, Vol.1, Section 9.62 Educator-Student.

This overly broad state sanction of physical force, including excessive force, without a "substantial and fair relation" to educational purposes shown, must be stricken as violative of the Equal Protection Clause, and the due process clause of the Fifth and Fourteenth Amendments. The statute on its face classifies persons in terms of their ability to exercise a fundamental right, namely, to be free from excessive public school corporal punishment. *See* due process discussion, *supra*, and *Estate of Bailey By Oare v. County of York*, 768 F.2d 503, 509 fn.7 (3rd Cir. 1985).

(3) *The "rational relation" test.*

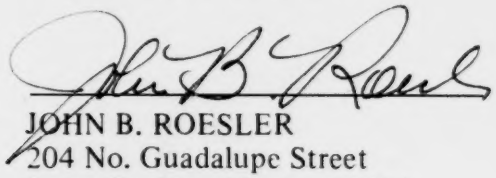
The equal protection clause of the Fourteenth Amendment requires that legislation of the state be rational, *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 486 (1955), and that the means be related to the end(s). When the legislation is irrational the court will review it for unconstitutionality. *Dandridge v. Williams*, 397 U.S. 471 (1970). If the legislation can be shown to be irrational, that is if the means set up by the legislature cannot reasonably bring about, or in fact does not bring about, the end set up by the legislature, then the law may be found to be violative of the Equal Protection Clause.

Petitioners have asked the lower Federal courts in this case for permission to go forward at trial to prove these two points. For purposes of a Rule 12(b) (6) motion, it does not appear beyond doubt that Petitioners cannot prove these allegations. The Court should consider the documentation of experts concerning the contraproductive dimensions of corporal punishment of children. *See* authorites in subsection (2), *supra*. This Court, in *Ingraham v. Wright, supra*, pp. 667-668, pointed out that teachers and administrators are privileged at common law to inflict *only punishment as is reasonably necessary for the proper education and discipline of the child*; any punishment that goes beyond the privilege may result in both civil and criminal liability.

CONCLUSION

For the abovestated reasons, this petition for certiorari should be granted.

Respectfully submitted,



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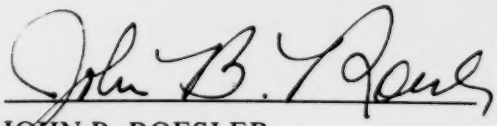
January 14, 1989

CERTIFICATE OF SERVICE

I, John B. Roesler, hereby certify that I am a member of the Bar of this Court and Counsel of Record for the Petitioners in this case, and that on January 12, 1989, pursuant to Rule 28.5(b) of the Rules of the Supreme Court of the United States, I caused three copies of the foregoing petition for writ of certiorari to be mailed, first-class postage prepaid, by depositing the documents in the United States post office, addressed to the following: John C. Hardy, Esquire, Hardy & Atherton, One American Center, Suite 300, 909 ESE Loop 323, Tyler, Texas 75701, and James P. Moon, Esquire, Simpson, Dowd, Kaplan, Lewis & Dowd, 4800 First Interstate Bank Tower, 1445 Ross Avenue, LB 214, Dallas, Texas 75202. I further certify that all parties required to be served have been served.



JOHN B. ROESLER
Counsel of Record
for Petitioner

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT – OCTOBER 26, 1988

REPORTED AT 858 F.2d 269 (5th Cir. 1988)

Crystal CUNNINGHAM per next friend Robert Rudy Cunningham, and Ashley Johnson per next friend, Larry Johnson, Plaintiffs-Appellants,

v.

Harry J. BEAVERS, Superintendent of Schools, Jacksonville Independent School District, et al., Defendants-Appellees.

No. 88-2304
Summary Calendar

United States Court of Appeals,
Fifth Circuit.

Oct. 26, 1988.

Action was brought against school authorites under civil rights statute alleging violation of constitutional rights of students who were paddled. The United States District Court for the Eastern District of Texas, William Wayne Justice, Chief Judge, dismissed action. Appeal was taken. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) students failed to state cause of action for deprivation of due process, and (2) Texas law permitting corporal punishment in schools did not violate equal protection,

Affirmed.

1. Civil Rights 13.9

Students who were paddled by teacher for alleged misconduct failed to state claim of depriviation of due process; if spankings given students were unreasonable and/or disproportionate to offense of "snickering," students would be entitled to relief under Texas common law, and those remedies would be fully adequate to afford students due process. U.S.C.A. Const.Amends. 5, 14.

2. Constitutional Law 211(1)

Equal protection clause directs that all persons similarly circumstanced shall be treated alike; it does not require classes of people different in fact or opinion to be treated in law as though they were the same. U.S.C.A. Const.Amend. 14.

3. Constitutional Law 213.1(2)

Because legislature must have substantial latitude to establish classifications when it attempts to remedy perceived problem, Court of Appeals looks only to whether classification at issue bears rational relationship to legitimate public purpose in applying equal protection clause to classification which neither disadvantages suspect class nor impinges upon exercise of fundamental right. U.S.C.A. Const.Amend. 14.

4. Constitutional Law 213.1(1)

"Suspect" classifications under equal protection clause are only those classifications which are likely to reflect deep-seated prejudice rather than legislative rationality in pursuit of legitimate objective. U.S.C.A. Const.Amend. 14.

5. Constitutional Law 213.1(1)

Children are not suspect class under equal protection clause. U.S.C.A. Const.Amend. 14.

6. Constitutional Law 48(4)

Under rational basis review of equal protection challenge, court presumes state legislation to be constitutionally valid. U.S.C.A. Const.Amend. 14.

7. Constitutional Law 213.1(2)

To comply with equal protection clause, classification imposed by statute or law must merely be reasonable in light of its purpose and must bear rational relationship to objectives of legislation so that all similarly situated people will be treated similarly. U.S.C.A. Const.Amend. 14.

8. Constitutional Law 213.1(2)

If evaluation of legislation challenged on equal protection grounds reveals any conceivable state purpose that can be considered as served by litigation, then it must be upheld. U.S.C.A. Const. Amend. 14.

9. Constitutional Law 242.(7)
Schools 176

Texas law permitting corporal punishment of children in schools was rationally related to goals of maintaining discipline and order in public schools as prerequisite to establishing most effective learning atmosphere, and thus, did not violate equal protection. U.S.C.A. Const.Amend. 14.

Peter J. Riga, Houston, Tex., John B. Roesler, Santa Fe, N.M., for plaintiffs-appellants.

John C. Hardy, Hardy & Atherton, Tyler, Tex., James P. Moon, Simpson, Dowd, Kaplan, Lewis & Dowd, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Texas.

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case involves a civil rights action for money damages which the district court dismissed, finding that the plaintiffs had stated no claim of deprivation of their equal protection and due process rights when they were paddled by school authorities. Because the state of Texas allows for the corporal punishment of children, and provides adequate state criminal and tort remedies for excessive punishment, we affirm the district court's dismissal of the plaintiffs' section 1983 complaint.

I

On May 6, 1987, Mary Sue Bruno, a public kindergarten school principal, saw Crystal Cunningham, five-years old, and Ashley Johnson, six-years old, snickering in the hall. Bruno gave each child two swats on the buttocks with a wooden paddle. When the girls returned to the classroom, their teacher, Rosa Cook, saw them still snickering. Cook took them out into the hallway and gave them another three swats across their buttocks with a wooden paddle.

When Ashley Johnson's grandmother bathed her that night she noticed black and blue marks on Ashley's buttocks. After Ashley told her grandmother what had happened, Dr. Anita

D'Sa examined Ashley and said that she had been spanked too hard. Both Ashley and Crystal were then taken by their parents to the Jacksonville Police Department where they made out a report, and an officer took color photographs of the bruises. The next day the children were taken to the Child Welfare Office where social workers took more photographs and stated that the situation clearly constituted child abuse. Ashley and Crystal missed three days of school that week, and three the following week. They cried and said that they did not want to return to school.

After the superintendent of schools, Harry Beavers, was told what had occurred he made his own investigation. He spoke with the children, but took no steps to discipline the other defendants.

The plaintiffs sued under 42 U.S.C. § 1983, alleging that the defendants, while acting under color of state law, deprived them of their federal constitutional rights. They sought monetary damages from the public school kindergarten principal and teacher who inflicted the injuries, and from the superintendent of schools and the Chairman of the Jacksonville Independent School District Board of Trustees for permitting the injuries to occur. The district court granted the defendants' motion to dismiss for failure to state a claim.

On appeal the plaintiffs assert that they were denied their rights to substantive due process because the punishment they received was excessive under the circumstances, and to equal protection, because the laws permitting the corporal punishment of children in schools are not rationally related to their goals.

II

A.

[1] The Supreme Court, in a similar case involving student paddling, held that although corporal punishment in public schools implicates a constitutionally protected liberty interest, traditional common law remedies are fully adequate to afford students due process. *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977), *affirming* 525 F.2d 909 (5th Cir. 1976) (en banc). Under Florida law, the Court noted, if the punishment inflicted is later found to have been excessive, the school authorities who inflicted it may be held liable in damages to the child, and possibly criminally liable if malice is shown. 430 U.S. at 678, 97 S.Ct. at 1415 & n. 45.

Following the Fifth Circuit and Supreme Court decisions in *Ingraham*, in *Coleman v. Franklin Parish School Board* this circuit affirmed the dismissal of claims for denial of due process where, by statute and jurisprudence, Louisiana had provided limits on the use of corporal punishment. 702 F.2d 74, 76 (5th Cir. 1983). In *Coleman*, a six-year-old first-grader sustained a minor head injury requiring two stitches when he was engaged in horseplay with another boy and a teacher struck him in the head with a coffee cup. The court recited *Ingraham's* holding that corporal punishment in concept is not arbitrary, capricious or wholly unrelated to the legitimate purpose of determining educational policy. If a remedy could be had for the violation of statutory limits on corporal punishment under Louisiana law, it held, an action for damages lies in state court. 702 F.2d at 76. *Coleman* did not state a claim for relief for a substantive due process violation; therefore, the district court properly dismissed the complaint for failure to state a claim.

Once again, in *Woodard v. Los Fresnos*, this circuit dismissed a civil rights action alleging a deprivation of procedural due process in the administration of corporal punishment to a student. In *Woodard*, a high school student was given three spanks for using abusive language to a school bus driver. This court said that "the infliction of punishment may transgress constitutionally protected liberty interests, but, if the state affords the student adequate post-punishment remedies to deter unjustified or excessive punishment and to redress that which may nevertheless occur, the student receives all the process that is constitutionally due." 732 F.2d 1243 at 1245 (5th Cir. 1984). We noted that Texas provides these traditional common law remedies.

In the instant case, the same common law remedies are available to the plaintiff. *See, e.g.*, Tex. Penal Code Ann. § 9.62 (Vernon); Tex.Educ.Code Ann. § 21.912 (Vernon Supp. 1986); *Hopkins v. Spring Independent School Dist.*, 763 S.W.2d 617, 618-19 (Tex.1987); *Barr v. Bernhard*, 562 S.W. 2d 844 (Tex 1978). For example, in *Hogenson v. Williams*, 542 S.W.2d 456 (Tex.Civ.App.–Texarkana 1976), a seventh grader was struck on his helmet by his football coach who was displeased with his performance. The boy was hit with sufficient force to cause him to stumble and fall to the ground. He was later admitted to the hospital, complaining of weakness of his left hand, left forearm and elbow, and spasms of his left neck muscles. It was several months before he recovered from his condition, diagnosed as a severe cervical sprain. His parents sued the coach to recover damages for assault. Although the coach argued that the physical contact he used was privileged, the court enunciated the rule of privileged force as that rule is properly applied in a civil assault case against a school teacher:

> [A]ny force used must be that which the teacher *reasonably* believes necessary (1) to enforce compliance with a *proper* command issued for the purpose of controlling, training or educating the child, or (2) to punish the child for prohibited conduct; and in either case, the force or physical contact must be reasonable and not disproportionate to the activity or the offense.

542 S.W.2d at 460. If the spankings given Crystal and Ashley were unreasonable and/or disproportionate to their offense of "snickering," the plaintiffs would be entitled to relief under Texas common law.

For these reasons, we find that the plaintiffs have not stated a claim of deprivation of due process. We are bound by our clear precedents in *Ingraham*, *Woodard* and *Coleman*, and therefore affirm the district court's dismissal of the plaintiffs' substantive due process claims.

B.

We next turn to the plaintiffs' equal protection claim. The plaintiffs argue that the common law end of the privilege to inflict corporal punishment on school children is discipline and education, but because modern research has proved this rationale to be irrational and counterproductive, the Texas laws allowing for the corporal punishment of children should be struck down as unconstitutional.

The plaintiffs first contend that children should be viewed as a suspect class because history is "filled with examples of the mistreatment of children." In the alternative, they argue that since children are an "at risk" group like women and aliens as a result of their historic mistreatment, the Texas corporal punishment laws should be subjected to intermediate scrutiny of their relevance to the goals sought.

[2-5] The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike; it does not require classes of people different in fact or opinion to be treated in law as though they were the same. *Plyler v. Doe,* 457 U.S. 202, 217, 102 S.Ct. 2382, 2394, 72 L.Ed. 2d 786, *reh. denied,* 458 U.S. 1131, 103 S.Ct. 14, 73 L.Ed.2d 1401 (1982) (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920); *Tigner v. Texas,* 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed.2d 1124 (1940)). Because a legislature must have substantial latitude to establish classifications when it attempts to remedy a perceived problem, we look only to whether the classification at issue bears a rational relationship to a legitimiate public purpose in applying the Equal Protection Clause to a classification which neither disadvantages a suspect class nor impinges upon the exercise of a fundamental right. *Plyler*, 457 U.S. at 217-18, 102 S.Ct. at 2394-95. "Suspect" classifications are only those which are likely to reflect deep seated prejudice rather than legislative rationality in pursuit of a legitimate objective. *Id.* at n. 14. No cases have ever held, and we decline to hold, that children are a suspect class. Furthermore, the "intermediate" scrutiny urged by the plaintiffs has only been applied in classifications based on gender, legitimacy or alienage. *See, e.g., Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), *reh. den.*, 429 U.S. 1124, 97 S.Ct. 1161, 51 L.Ed.2d 574 (1977); *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978). We therefore engage only in rational-basis review of the Texas laws allowing for the corporal punishment of school children.

[6-8] Under a rational basis review, the court presumes state legislation to be constitutionally valid. A classification imposed by statute or law must merely be reasonable in the light of its purpose and must bear a rational relationship to the

objectives of the legislation so that all similarly situated people will be treated similarly. *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368, *reh'g denied*, 450 U.S. 960, 101 S.Ct. 1421, 67 L.Ed.2d 385 (1981). If evaluation of challenged legislation reveals any conceivable state purpose that can be considered as served by the legislation, then it must be upheld. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir. 1986).

[9] As we stated in *Ingraham*, 525 F.2d at 916-17:

> Certainly, maintenance of discipline and order in public schools is a prerequisite to establishing the most effective learning atmosphere and as such is a proper object for state and school board regulation. Without the existence of disciplinary sanctions for misbehavior, students who desire to learn would be deprived of their right to an education by the more disruptive members of their class.

We could not say then, and we cannot say now, that the Texas legislature did not have a rational basis for its legislation.

The plaintiffs argue that empirical research since *Ingraham* has shown that corporal punishment encourages aggressive behavior and has negative long-term effects on learning, and that this evidence refutes the rationality of using corporal punishment to achieve the goals of discipline and education. We are not persuaded by this argument, and in any event, this panel is not free to disregard our en banc opinion in *Ingraham*, in which this circuit expressed its unwillingness to hold that corporal punishment, as one of the means used to achieve an atmosphere that facilitates the effective transmittal of knowledge, has no real and substantial relation to the object sought. *Ingraham*, 525 F.2d at 916-17. The concerns voiced by the plaintiffs and the wealth of empirical research they

bring to the attention of the court are more properly brought to the attention of the Texas legislature. *See Baker v. Wade*, 774 F.2d 1285, 1287 (5th Cir.1985).

III

We find that the district court properly dismissed the plaintiffs' section 1983 action for failure to state a claim of deprivation of substantive due process or equal protection for which relief can be granted. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B
JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT – OCTOBER, 26, 1988

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2304
Summary Calendar
D.C. Docket No. TY-87-332-CA

U.S. Court of Appeals
FILED
Oct 26, 1988
Gilbert E. Ganucheau
Clerk

CRYSTAL CUNNINGHAM, ET AL.,
Plaintiff-Appellant,

Versus

HARRY J. BEAVERS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

Before CLARK, Chief Judge, JOHNSON, and JOLLY, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

October 26, 1988

ISSUED AS MANDATE: Nov 17, 1988

APPENDIX C
ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS,
TYLER DIVISION – FEBRUARY 29, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CRYSTAL CUNNINGHAM, et al.,
Plaintiffs,

v. CIVIL ACTION NO. TY-87-332-CA

HARRY J. BEAVERS, SUPT.
of Schools, et al.,
Defendants.

ORDER

In this civil action, it is alleged that the substantive and procedural due process rights of two school children, aged five and six years, respectively, were violated when they were corporally punished by a teacher and a principal in the Jacksonville, Texas, public schools. It is further alleged that defendants, including the Jacksonville superintendent of schools, conspired to violate plaintiffs' civil rights and to intimidate them from seeking redress of their grievances. Plaintiffs also claim that Texas laws permitting corporal punishment of school children violate the Equal Protection Clause of the Fourteenth Amendment. Various state law claims are included in the complaint. Defendants move to dismiss, arguing that no federal claim has been stated and, in the alternative, that they are entitled to qualified immunity.

"Corporal punishment is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." *Woodard v. Los Fresnos Independent School District*, 732 F.2d 1243, 1246 (5th Cir. 1984). The United States Court of Appeals for the Fifth Circuit has recognized that an individual instance of corporal punishment may, in theory, violate a child's right to substantive due process. *See id.; see also Jefferson v. Ysleta Independent School District*, 817 F.2d 393, 395-96 (5th Cir. 1987). However, the Fifth Circuit has yet to sustain a discrete claim of that kind.

In ruling on a motion to dismiss, the complaint's allegations are taken as true. According to the complaint, the two girls each received a total of five blows on the buttocks with a paddle. Their alleged transgressions were "snickering" and "wild walking." The blows left pronounced bruises across the backsides of both children. Each child missed six days of school and remains frightened and tearful about attending the institution. Two social workers who viewed photographs of their injuries stated that the children clearly had been victims of child abuse.

In Coleman v. Franklin Parish School Board, 702 F.2d 74 (5th cir. 1983), a six-year-old child allegedly was struck on the head with a coffee cup, by a teacher, for engaging in forbidden horseplay in the halls. Two stitches were required to close the resulting cut. The Fifth Circuit upheld that portion of the district court's order which dismissed the plaintiff's substantive due process claim. If there was no substantive due process claim stated in *Coleman*, where a similarly youthful child received a gash in the head from a hard object, it is difficult to contend that one is stated here. Although the Fifth Circuit might view the matter differently on appeal, this court believes itself bound by precedent in finding no deprivation of sub-

stantive due process under the facts alleged in the complaint. Nor has a procedural due process claim been stated. "[I]f the state affords the student adequate post-punishment remedies to deter unjustified or excessive punishment and to redress that which may nevertheless occur, the student receives all the process that is constitutionally due. Texas provides these common law traditional remedies." Woodard, 732 F.2d at 1245 (footnotes omitted).

Plaintiff's conspiracy claim is devoid of any facts suggesting concerted action, intimidation, or class-based animus. That portion of the complaint must also be dismissed.

The gist of plaintiffs' equal protection argument is that the State of Texas has made an irrational distinction in proscribing child abuse while permitting corporal punishment. While these two state positions may exist in moral conflict, their respective legal validity is beyond question. The Supreme Court sanctioned corporal punishment in *Ingraham v. Wright*, 430 U.S. 651 (1977), and the state's interest in preventing child abuse can hardly be challenged. Invalidating the state's corporal punishment law on equal protection grounds would require a court to ignore *Ingraham*, a decision which surely presupposes that rational distinctions exist between child abuse and corporal punishment. In light of *Ingraham*, plaintiffs have failed to state an equal protection claim.

Dismissal of the federal claims moots the issue of qualified immunity, while ending the court's jurisdiction over plaintiff's pendent claims. Accordingly, it is ORDERED that defendants' motion to dismiss shall be, and it is hereby, GRANTED. It is further

ORDERED that this civil action shall be, and it is hereby, DISMISSED.

SIGNED this 29th day of February, 1988.

/s/ William Wayne Justice

CHIEF JUDGE

APPENDIX D
TEXT OF 42 U.S.C. Section 1985

Conspiracy to interfere with civil rights

Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for law-

fully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire to or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

APPENDIX E
EXCERPT FROM BRIEF FOR APPELLANTS, STATEMENT OF THE CASE *CUNNINGHAM v. BEAVERS*, IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, CIVIL No. 88-2304 JUNE 2, 1988

STATEMENT OF THE CASE

COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW, WITH STATEMENT OF FACTS

Plaintiffs Crystal Cunningham and Ashley Johnson, minors, by and through next friends, bring this civil rights action for money damages arising under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983 for extensive injury and bruises to their buttocks, and mental suffering, due to excessive corporal punishment, disproportionate to the circumstances and shocking to the conscience, against the public kindergarten school principal and teacher who inflicted said injuries, and against school administrators for permitting the brutality to occur. (COMPLAINT)

Crystal Cunningham and Ashley Johnson were at all times pertinent hereto minor pupils at Westside Kindergarten School, Jacksonville Independent School District, Jacksonville, Texas (hereinafter "Kindergarten"). (COMPLAINT, p.2)

Defendant Dr. Harry J. Beavers was at all times pertinent hereto the Superintendent of Kindergarten, acted under color of state law, and was empowered by the State of Texas to permit, and did permit, the use of corporal punishment at said school. He was empowered by the State of Texas to hire, fire and otherwise supervise the conduct and behavior of the following Defendants regarding administration of corporal punishment at Kindergarten. (COMPLAINT, p.2)

Defendant Mary Sue Bruno was at all times pertinent hereto the principal of Kindergarten, acted under color of state law, and was empowered by the State of Texas to discipline and punish children in said school, including the use of corporal punishment, and was empowered by the State of Texas to supervise the conduct and behavior of Defendant Rosa Cook regarding the administration of corporal punishment at said school. (COMPLAINT, pp. 2-3)

Defendant Rosa Cook was at all times pertinent hereto a teacher at Kindergarten, acted under color of state law, and was empowered by the State of Texas to discipline and punish children in her classroom, including use of corporal punishment at Kindergarten. (COMPLAINT, p.3)

Defendant Tony Bolton was at all times pertinent hereto the Chairman of the Board of Trustees of Jacksonville Independent School District, Jacksonville, Texas and acted under color of state law which permitted children to be disciplined and punished by corporal punishment within his district, including those in Kindergarten, and said Defendant had supervisory power to hire and fire and otherwise control the conduct and behavior of all the aforementioned Defendants. It was under Defendant Bolton's authority that the disciplinary manual was written and promulgated to all of the schools in his school district, including Kindergarten. (COMPLAINT, p.3)

On or about May 6, 1987, Plaintiff Crystal Cunningham and Ashley Johnson, ages 5 and 6 respectively, were pupils in Kindergarten. They were observed to be "snickering" by Defendant principal Bruno in the hall. Bruno then proceeded to give each child two "swats" on their buttocks with a wooden paddle. When they returned to the classroom Defendant teacher Cook observed them still "snickering", so she took the two girls into the hallway and proceeded to give them another

three "swats" each across their buttocks with a wooden paddle. (COMPLAINT pp. 3,4)

When the grandmother of Ashley Johnson gave her a bath that evening, she noticed terrible black and blue marks on the child's buttocks. It was then that Ashley told her grandmother what had happened. (COMPLAINT, p.4)

Ashley Johnson was examined by Dr. Anita D'Sa, M.D., who said that the girl had been spanked "too hard" and that the spanking was "awful". (COMPLAINT, p.4)

The Plaintiffs were then taken by their parents to the Jacksonville Police Department where they made out a report and an officer, Debbie McKnight, took color photos of the bruises. The next day the children were taken to the Child Welfare Office where again pictures were taken by Jeanne Dixon and Pat McCullogh, social workers, who claimed that this was clearly "child abuse" and that "one was a left-handed child abuser and the other a right-handed child abuser". (COMPLAINT p.4)

This infliction of corporal punishment caused extensive injury, inflicted severe pain, and caused humiliation and physical and mental suffering. The "punishment" was excessive, brutal, disproportionate to the circumstances, and shocking to the conscience. The lashing of these children in Kindergarten was gross and wanton and a reckless and intentional disregard of their rights and well-being. Plaintiffs missed three days of school that week, and three days the following week. Both cried and said that they did not want to go back to the school any longer. (COMPLAINT p.5)

Defendant Beavers was told of these happenings. He then came to the school to make his own investigation. He singled out the two Plaintiffs and asked them whether they liked Defendant Cook. In addition, he had a conversation with

Mr. Cunningham, parent of one of the Plaintiffs, and asked him, "What would it take to settle with me?" But he took no measures to discipline the other Defendants or fire or adequately warn them, and through custom, policy, inadequate or lack of supervision allowed such brutal conduct, and allowed it to go on, and in so doing was inspired by malice, and displayed gross and wanton and reckless disregard for the rights and well-being of Plaintiffs. (COMPLAINT, p.5)

The conduct complained of constituted a deprivation of Plaintiffs' rights to substantive and procedural due process and equal protection under the law, violating the aforementioned constitutional amendments and statutory provisions. (COMPLAINT, p.6)

Defendants' original Answer and their Motion to Dismiss argued that Plaintiffs were precluded by the Fifth Circuit and the United States Supreme Court's decisions in *Ingraham v. Wright, infra.* (Motion To Dismiss)

Plaintiffs responded that the charges of brutality, as substantiated by doctors, social workers, and police officers, were undisputed and that the pleadings must be taken as true for purposes of a Rule 12(b) (6) motion, and must be viewed in the light most favorable to the Plaintiffs. (Answer To Motion To Dismiss; Supplemental Answer To Defendants' Motion To Dismiss)

Motion to Dismiss was granted by the District Court for the Eastern District of Texas, Tyler Division, on February 29, 1988, by the Honorable Wm. Wayne Justice, who sustained the Motion to Dismiss on all counts. While the Trial Judge was sympathetic to Plaintiffs' argument concerning substantive due process, he felt bound by the precedent of this Court in *Coleman v. Franklin Parish School Bd., infra,* and ruled against Plaintiffs on this issue as well. (ORDER)

Plaintiffs perfected their appeal to this Court in timely fashion on March 29, 1988, at the Trial Court, Eastern District of Texas, Tyler under Rules 3 and 4, F.R.A.P. Appeal was certified to this Court on April 4, 1988. Under Rule F.R.A.P. 12, Plaintiffs had 40 days to file their appeal brief. Extension of that time was certified by the clerk of this Court on May 9, 1988, and the time was extended to June 6, 1988, within which this brief is timely filed.

III. THE FIFTH CIRCUIT'S DENIAL OF THE SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAIMS FOR EXCESSIVE PUBLIC SCHOOL CORPORAL PUNISHMENT INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW AND RAISES VITAL ISSUES CONCERNING FEDERAL COURT SCRUTINY OF PUBLIC SCHOOL DISCIPLINARY DECISIONS WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Substantive Due Process.

In *Ingraham v. Wright, supra*, this Court expressly stated that it had no occasion to consider "whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate rights under the Due Process Clause," 430 U.S. 651, 679, fn. 47 (1877).

This Court has not decided this important question presented for review previously in *Ingraham v. Wright, supra,* and in *Garcia By Garcia*, supra.

The liberty interest of public school children involves vital issues concerning Federal court scrutiny of public school disciplinary decisions. An estimated 1.5 million children are punished physically in public schools every year, *Newsweek*, June 22, 1987, p. 61.

Robert E. Fathman, Ph.D., Chairman of the National Coalition to Abolish Corporal Punishment in Schools, which organizaiton includes the American Bar Association, the American Medical Association, the National Education Association, the National P.T.A., the American Academy of Pediatrics, the National Commission for the Prevention of Child Abuse, the National Association of School Psychologists, the American Psychiatric Association, the Child Welfare League of America, and the National Mental Health Association, (January 6, 1989 Quotation, Personal Communication) states that:

> Based upon studies, and data from the U.S. Department of Education, it is estimated that 30,000 American school children are physically injured each year by

> teachers in public schools because of the infliction of corporal punishment, to a degree that requires medical treatment. At least 100,000 children develop emotional and learning disabilities from excessive and inappropriate school punishment each year.

The same acts of excessive punishment may implicate substantive due process rights in the Third, Fourth and Tenth Circuits, but will be dismissed out of court in the Fifth Circuit. Resolution of this conflict will help determine the extent to which public school disciplinary decisions will be subjected to, or afforded Federal court scrutiny.

By granting review to resolve this conflict among the circuits, the Court has the opportunity once again to address issues which are fundamental to school officials, students and parents alike throughout the country. Review of this case will also serve the extremely important purpose of determining what standard defines the violation, thereby providing sorely needed guidance to public school officials and to the lower Federal courts.

B. Supremacy Clause.

The effect of the Court of Appeals for the Fifth Circuit's decision in *Cunningham*, which denies the constitutional claim for violation of the liberty interest in cases of "unreasonable and/or disproportionate" public school corporal punishment, when there is state tort or criminal remedy, is preemption by state law of the protection afforded under the due process of the Fifth and Fourteenth Amendment of the United States Constitution. Under *Cunningham*, state law becomes the supreme and exclusive remedy in violation of the Supremacy Clause of the United States Constitution, Article VI [2], which provides as follows:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all Treaties made, under the Authority of the United

APPENDIX F

UNITED STATES CONSTITUTION, ARTICLE VI [2]

This Constitution and the laws of the United States which shall be made in pursuance thereof, and all Treaties made, under the Authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary not withstanding.

APPENDIX G
TEXT OF 42 U.S.C. SECTIONS 5101-07, SUBCHAPTER I – CHILD ABUSE PREVENTION AND TREATMENT

§ 5101 National Center on Child Abuse and Neglect

(a) Establishment

The Secretary of Health and Human Services (hereinafter referred to in this subchapter as the "Secretary") shall establish an office to be known as the National Center on Child Abuse and Neglect (hereinafter referred to in this subchapter as the "Center")'

(b) Functions

The Secretary, through the Center shall–

(1) Annual research summary

compile, analyze, publish, and disseminate a summary annually of recently conducted and currently conducted research on child abuse and neglect;

(2) Publication and dissemination of materials for child sexual abuse programs and prosecutions

compile, evaluate, publish, and disseminate to each State such materials and information as may assist the States in achieving the objectives of section 5103(d) of this title; including an evaluation of various methods and procedures for the investigation and prosecution of child physical and sexual abuse cases and resultant psychological trauma of the child victim;

(3) Information clearinghouse

develop and maintain an information clearinghouse on all programs, including private programs, showing promise of success, for the prevention, identification, and treatment of child abuse and neglect;

(4) Training materials for personnel

compile, publish, and disseminate training materials for personnel who are engaged or intend to engage in the prevention, identification, and treatment of child abuse and neglect;

(5) Model training materials

develop and disseminate to appropriate State and local officials, model training materials to assist in training law enforcement, legal, judicial, medical, mental health, and child welfare personnel in appropriate methods of interacting during investigative, administrative, and judicial proceedings with children subjected to child abuse;

(6) Technical assistance

provide technical assistance (directly or through grant or contract) to public and nonprofit private agencies and organizations to assist them in planning, improving, developing, and carrying out programs and activites relating to the prevention, identification, and treatment of child abuse and neglect;

(7) Research on causes, prevention, identification, and treatment of child abuse and neglect, and on appropriate procedures in cases of child abuse

conduct research on the causes, prevention identification, and treatment of child abuse and neglect, and on appropriate and effective investigative, administrative, and judicial procedures in cases of child abuse;

(8) Study

make a complete and full study and investigation of the national incidence of child abuse and neglect, including a

determination of the extent to which incidents of child abuse and neglect are increasing in number or severity; and

(9) Reports

in consultation with Federal agencies serving on the Advisory Board on Child Abuse and Neglect (established by section 5105 of this title), prepare a comprehensive plan for seeking to bring about maximum coordination of the goals, objectives, and activities of all agencies and organizations which have responsibilities for programs and activities related to child abuse and neglect and submit such paln to such Advisory Board not later than twelve months after April 24, 1978.

(10) Evaluation of assisted programs; report to Congress

not later than two years after the first fiscal year for which funds are obligated under section 10603a of this title, the Secretary shall–

(A) evaluate the effectiveness of assisted programs in achieving the objectives of section 5103(d) of this title; and

(B) submit a report to the appropriate committees of the Congress of such evaluation and of technical assistance in achieving the objectives of such section provided to the States through the National Center on Child Abuse and Neglect.

The Secretary shall establish research priorities for making grants or contracts under clause (5) of this subsection and, not less than sixty days before establishing such priorities, shall publish in the Federal Register for public comment a statement of such proposed priorities.

(c) Grant and contract authority; duration and review of research grants

The functions of the Secreatary under subsection (b) of this section may be carried out either directly or by way of

grant or contract. Grants may be made under subsection (b)(5) of this section for periods of not more than three years. Any such grant shall be reviewed at least annually by the Secretary, utilizing peer review mechanisms to assure the quality and progress of research conducted under such grant.

(d) Staff and resource availability to Center

The Secretary shall make available to the Center such staff and resources as are necessary for the Center to carry out effectively its functions under this subchapter.

(e) Use of funds

No funds appropriated under this subchapter for any grant or contract may be used for any purpose other than that for which such funds were specifically authorized.

§ 5102 Definitions

For purposes of this subchapter–(1) the term "child abuse and neglect" means the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of eighteen, or the age specified by the child protection law of the State in question, by a person (including any employee of a residential facility or any staff person providing out-of-home care) who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary;

(2)(A) the term "sexual abuse" includes–

(i) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or having a child assist any other person to engage in, any sexually explicit conduct (or any simulation of such conduct) for the purpose of producing any visual depiction of such conduct, or

(ii) the rape, molestation, prostitution, or other such form of sexual exploitation of children, or incest with children,

under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary; and

(B) for the purpose of this clause, the term "child" or "children" means any individual who has not or individuals who have not attained the age of eighteen.

(3) the term "withholding of medically indicated treatment" means the failure to repsond to the infant's life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) which, in the treating physician's or physicians' reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all such conditions, except that the term does not include the failure to provide treatment (other than appropriate nutrition, hydration, medication) to an infant when, in the treating physician's or physicians' reasonable medical judgment, (A) the infant is chronically and irreversibly comatose; (B) the provision of such treatment would (i) merely prolong dying, (ii) not be effective in ameliorating or correcting all of the infant's life-threatening conditions, or (iii) otherwise be futile in terms of the survival of the infant; or (C) the provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

§ 5103. Demonstration or service programs and projects

(a) Grants and contracts; scope of activities

The Secretary, through the Center, is authorized to make grants to, and enter into contracts with, public agencies or non-

profit private organizations (or combinations thereof) for demonstration or service programs and projects designed to prevent, identify, and treat child abuse and neglect. Grants or contracts under this subsection may be–

(1) for training programs for professional and paraprofessional personnel in the fields of medicine, law, education, social work, and other relevant fields who are engaged in, or intend to work in, the field of the prevention, identification, and treatment of child abuse and neglect; and training programs for children, and for persons responsible for the welfare of children, in methods of protecting children from child abuse and neglect;

(2) for the establishment and maintenance of centers, serving defined geographic areas, staffed by multidisciplinary teams of personnel trained in the prevention, identification, and treatment of child abuse and neglect cases, to provide a broad range of services related to child abuse and neglect, including direct support and supervision of satellite centers and attention homes, as well as providing advice and consultation to individuals, agencies, and organizations which request such services;

(3) for furnishing services of teams of professional and paraprofessional personnel who are trained in the prevention, identification, and treatment of child abuse and neglect cases, on a consulting basis to small communities where such services are not available; and

(4) for such other innovative programs and projects, including programs and projects for parent self-help, and for prevention and treatment of drug-related child abuse and neglect, that show promise of successfully preventing or treating cases of child abuse and neglect as the Secretary may approve.

(b) Grants to States; qualifications for assistance; reduction of awards; compliance of social security provisions with certain requirements

(1) The Secretary, through the Center, is authorized to make grants to the States for the purpose of assisting the States in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs.

(2) In order for a State to qualify for assistance under this subsection, such State shall–

(A) have in effect a State child abuse and neglect law which shall include provisions for immunity for persons reporting instances of child abuse and neglect from prosecution, under any State or local law, arising out of such reporting;

(B) provide for the reporting of known and suspected instances of child abuse and neglect;

(C) provide that upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and, upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child, as well as that of any other child under the same care who may be in danger of abuse or neglect;

(D) demonstrate that there are in effect throughout the State, in connection with the enforcement of child abuse and neglect laws and with the reporting og suspected instances of child abuse and neglect, such administrative procedures, such personnel trained in child abuse and neglect prevention and treatment, such training procedures, such institutional and other facilities (public and private), and such related multidisciplinary programs and services as may be necessary or appropriate to assure that the State will

deal effectively with child abuse and neglect cases in the State;

(E) provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, and the child's parents or guardians;

(F) provide for the cooperation of law enforcement officials, courts of competent jurisdiction, and appropriate State agencies providing human services; ——

(G) provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardina ad litem shall be appointed to represent the child in such proceedings;

(H) provide that the aggregate of support for programs or projects related to child abuse and neglect assisted by State funds shall not be reduced below the level provided during fiscal year 1973, and set forth policies and procedures designed to assure that Federal funds made available under this subchapter for any fiscal year will be so used as to supplement and, to the extent practicable, increase the level of State funds which would, in the absence of Federal funds, be available for such programs and projects;

(I) provide for dissemination of information to the general public with respect ot the problem of child abuse and neglect and the facilities and prevention and treatment methods available to combat instances of child abuse and neglect;

(J) to the extent feasible, insure that parental organizations combating child abuse and neglect receive preferential treatment; and

(K) within one year after Oct. 9, 1984, have in place for the purpose of responding to the reporting of medical neglect (including instances of withholding of medically

indicated treatment from disabled infants with life-threatening conditions), procedures or programs, or both (within the State child protective services system), to provide for (i) coordination and consultation with individuals designated by and within appropriate health-care facilities, (ii) prompt notification by individuals designated by and within appropriate health-care facilities of cases of supected medical neglect (including instances of withholding of medically indicated treatment from disabled infants with life-threatening conditions), and (iii) auhority, under State law, for the State child protective service system to pursue any legal remedies, including the authority to initiate legal proceedings in a court of competent jurisdiction, as may be necessary to prevent the withholding of medically indicated treatment from disabled infants with life-threatening conditions.

If a State has failed to obligate funds awarded under this subsection within eighteen months after the date of award, the next award under this subsection made after the expiration of such period shall be reduced by an amount equal to the amount of such unobligated funds unless the Secretary determines that extraordinary reasons justify the failure to so obligate.

(3)(A) Subject to subparagraph (B) of this parapgraph, any State which on Oct. 9, 1984 does not qualify for assistance under this subsection may be granted a waiver of any requirement under paragraph (2) of this subsection–

(i) for a period of not more than one year, if the Secretary makes a finding that such State is making a good faith effort to comply with any such requirement, and for a second one-year period if the Secretary makes a finding that such State is making substantial progress to achieve such compliance; and for a third one-year period if the Secretary makes an additional finding that such

State is making substantial progress to achieve such compliance, or

(ii) for a nonrenewable period of not more than two years in the case of a State the legislature of which meets only biennially, if the Secretary makes a finding that such State is making a good-faith effort to comply with any such requirement.

(B) No waiver under supparagraph (A) may apply to any requirement under parapgraph (2)(K) of this subsection.

(4) Programs or projects related to child abuse and neglect assisted under part B of title IV of the Social Security Act [42 U.S.C.A. § 620, et seq.] shall comply with the requirements set forth in clauses, (B), (C), (E), (F), and (K) of paragraph (2).

(c) Additional grants to States; purpose; training and technical assistance; information and resource clearinghouse; use of funds

(1) The Secretary is authorized to make additional grants to the States for the purpose of developing, establishing, and operating or implementing–

(A) the procedures or programs required under clause (K) of subsection (b)(2) of this section;

(B) information and education programs or training programs for the purpose of improving the provision of services to disabled infants with life-threatening conditions for (i) professional and paraprofessional personnel concerned with the welfare of disabled infants with life-threatening conditions, including personnel employed in child protective services programs and health-care facilities, and (ii) the parents of such infants; and

(C) programs to help in obtaining or coordinating necessary services, including existing social and health services

and financial assistance for families with disabled infants with life-threatening conditions, and those services necessary to facilitate adoptive placement of such infants who have been relinquished for adoption.

(2)(A) The Secretary shall provide, directly or through grants or contracts with public or private nonprofit organizations, for (i) training and technical assistance programs to assist States in developing, establishing, and operating or implementing programs and procedures meeting the requirements of clause (K) of subsection (b)(2) of this section; and (ii) the establishment and operation of national and regional information and resource clearinghouses for the purpose of providing the most current and complete information regarding medical treatment procedures and resources and community resources for the provision of services and treatment for disabled infants with life-threatening conditions (including compiling, maintaining, updating, and disseminating regional directories of community services and resources (including the names and phone numbers of State and local medical organizations) to assist parents, families, and physicians and seeking to coordinate the availability of appropriate regional education resources for health-care personnel).

(B) Not more than $1,000,000 of the funds appropriated for any fiscal year under section 5104 of this title may be used to carry out this paragraph.

(C) Not later than 210 days after Oct. 9, 1984, the Secretary shall have the capability of providing and begin to provide the training and technical assistance described in subparagraph (A) of this paragraph.

(d) Grants to States; child sexual abuse programs and prosecution; qualifications for assistance; task force on children's justice; recommendations and compliance

(1) The Secretary (acting through the Center and in consultation with the Attorney General) is authorized to make grants to the States for the purpose of assisting States in developing, establishing, and operating programs designed to improve (A) the handling of child abuse cases, particularly cases of child sexual abuse, in a manner which limits additional trauma to the child victim, and (B) the investigation and prosecution of cases of child abuse, particularly child sexual abuse.

(2) In order for a State to qualify for assistance under this subsection, such State shall–

(A) fulfill the requirements of subsections (b)(2) and (4) of this section or receive a waiver of such requirements under subsection (b)(3) of this section;

(B) establish a task force as provided in paragraph (3);

(C) fulfill the requirements of paragraph (4); and

(D) submit an application to the Secretary at such time and containing such information and assurances as the Secretary considers necessary, including an assurance that the State will make such reports to the Secretary as may reasonably be required and will maintain and provide access to records relating to activities under this subsection.

(3)(A) Except as provided in subparagraph (B), a State requesting assitance under this subsection shall establish or designate a multidisciplinary task force on children's justice (hereinafter referred to as "the task force") composed of professionals with knowledge and experience related to the criminal justice system and issues of child abuse. The task force shall include individuals representing the law enforcement community, judicial and legal officers (including individuals involved with the defense as well as the prosecution of such cases), child advocates, health agencies, individuals representing child protective service agencies, individuals experienced in

working with handicapped children, parents, and parents' groups.

(B) As determined by the Secretary, a commission or task force established after January 1, 1983, with substantially comparable membership and functions, may be considered the task force for the purposes of this subsection.

(C) Before a State receives assistance under this subsection, the task force shall (i) review and evaluate State investigative, administrative, and judicial handling of cases of child abuse, particularly child sexual abuse, and (ii) make recommendations in each of the categories described in paragraph (4). The task force may make such other comments and recommendations as are considered relevant and useful.

(4)(A) Subject to the provisions of subparagraph (B), the State shall adopt recommendations of the task force in each of the following categories:

(i) investigative, administrative, and judicial handling of cases of child abuse, particularly child sexual abuse cases, in a manner which reduces the additional trauma to the child victim and which also ensures procedural fairness to the accuses;

(ii) experimental, model, and demonstration programs for testing innovative approaches and techniques which may improve the rate of successful prosecution or enhance the effectiveness of judicial and administrative action in child abuse cases, particularly child sexual abuse cases, and which also ensure procedural fairness to the accused; and

(iii) reform of State laws, ordinances, regulations, and procedures to provide comprehensive protection for children from abuse, particularly sexual abuse, while ensuring fairness to all affected persons.

(B) As determined by the Secretary, a State shall be considered to be in fulfillment of the requirements of this paragraph if–

(i) the State adopts an alternative to the recommendations of the task force, which carries out the purposes of this subsection, om each of the categories under subparagraph (A) for which the task force's recommendations are not adopted; or

(ii) the State is making substantial progress toward adopting the recommendations of the task force or a comparable alternative to such recommendations.

(5) For grants under paragraph (1), the Secretary shall use the amount authorized by section [10603a of this title].

(e) Prohibition of assistance for construction of facilities lease or rental and alteration or repair of facilities

Assistance provided pursuant to this section shall not be available for construction of facilities; however, the Secretary is authorized to supply such assistance for the lease or rental of facilities where adequate facilities are not otherwise available, and for repair or minor remodeling or alteration of existing facilities.

f) Criteria for equitable distribution of assistance

The Secretary shall establish criteria designed to achieve equitable distribution of assitance under this section among the States, among geographic areas of the Nation, and among rural and urban areas. To the extent possible, citizens of each State shall receive assistance from at least one project under this section.

(g) Definition

For the purpose of this section, the term "State" includes each of the several States, the District of Columbia, the

Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam and the Trust Territories of the Pacific.

(h) Availability of assistance for prevention of child abuse and neglect

The Secretary, in consultation with the Advisory Board on Child Abuse and Neglect, shall ensure that a proportionate share of assistance under this subchapter is available for activities related to the prevention of child abuse and neglect.

§ 5104 Authorization of appropriations and funding requirements for child abuse and neglect and sexual abuse programs or projects

There are hereby authorized to be appropriated for the purposes of this subchapter $15,000,000 for the fiscal year ending June 30, 1974, $20,000,000 for the fiscal year ending June 30, 1975, $25,000,000 for the fiscal year ending June 30, 1976, and for the succeeding fiscal year, $25,000,000 for the fiscal year ending September 30, 1978, $27,500,000 for the fiscal year ending September 30, 1980, and September 30, 1981, respectively. There are hereby further authorized to be appropriated for the purposes of this subchapter $33, 500,000 for fiscal year 1984, $40,000,000 for fiscal year 1985, $41,500,000 for fiscal year 1986, and $43,100,000 for fiscal year 1987. Of the funds appropriated for any fiscal year under this section except as provided in the succeeding sentence, (A) not less than $9,000,000 shall be available in each fiscal year to carry out section 5103(b) of this title (relating to State grants), (B) not less that $11,000,000 shall be available in each fiscal year to carry out sections 5103(a) (relating to demonstration or service projects), 5101(b)(1) and 5101(b)(3) (relating to information dissemination), 5101(b)(5) (relating to research), and 5103(c)(2) (relating to training, technical assistance, and information dissemination) of this title, giving special consideration to continued funding of child abuse and

neglect programs or projects (previously funded by the Department of Health and Human Services) of national or regional scope and demonstrated effectiveness, (C) $5,000,000 shall be available in each such year for grants and contracts under section 5103(a) of this title, for identification, treatment, and prevention of sexual abuse, and (D) $5,000,000 shall be available in each such year for the purpose of making additional grants to the States to carry out the provisions of section 5103 (c)(1) of this title. With respect to any fiscal year in which the total amount appropriated under this section is less than $30,000,000, funds shall first be available as provided in clauses (A) and (B) in the preceding sentence and of the remainder one-half shall be available as provided for in clause (C) and one-half as provided for in clause (D) in the preceding sentence.

§ 5105. Advisory Board on Child Abuse and Neglect

(a) Appointment; membership; meetings; representation from Federal agencies and general public; functions

The Secretary shall, within sixty days after January 31, 1974, appoint an Advisory Board on Child Abuse and Neglect (hereinafter referred to as the "Advisory Board"), which shall be composed of representatives from Federal agencies with responsibility for programs and activities related to child abuse and neglect, and not less than three members from the general public with experience or expertise in the field of child abuse and neglect. The Advisory Board shall meet at least every six months.

The Advisory Board in order to prevent unnecessary duplication of such programs, to ensure efficient allocation of resources, and to assure that programs effectively address all aspects of the child abuse problem shall assist the Secretary in coordination programs and activities related to child abuse and neglect planned, administered, or assisted under this sub-

chapter with such programs and activities planned, administered or assisted by the Federal agencies whose representatives are members of the Advisory Board. The Advisory Board shall also assist the Secretary in the development of Federal standards for child abuse and neglect prevention and treatment programs and projects. The Advisory Board may be available, at the Secretary's request, to assist the Secretary in coordinating adoption-related activities of the Federal Government.

(b) Compensation; travel expenses and per diem

Members of the Advisory Board, other than those regularly employed by the Federal Government, while serving on business of the Advisory Board, shall be entitled to receive compensation at a rate not in excess of the daily equivalent payable to a GS-18 employee under section 5332 of Title 5, including travel-time; and, while so serving away from their homes or regular places of business, they may be allowed travel expenses (including per diem in lieu of subsistence) as authorized by section 5703 of such title for persons in the Government service employed intermittently.

§ 5106. Coordination of Federal programs; regulations; arrangements

The Secretary shall promulgate regulations and make such arrangements as may be necessary or appropriate to ensure that there is effective coordination among programs related to child abuse and neglect under this subchapter and other such programs which are assisted by Federal funds.

§ 5107. Discretionary programs; authorization of appropriations

(a)(1) The Secretary of Health and Human Services, either directly, through grants to States and public and private, non-profit organizations and agencies, or through jointly financed cooperative arrangements with States, public agencies, and

other agencies and organizations, is authorized to provide for activiities of national significance related to child abuse prevention and treatment and adoption reform, including operation of a national center to collect and disseminate information regarding child abuse and neglect, and operation of a national adoption information exchange system to facilitate the adoptive placement of children.

(2) The Secretary, in carrying out the provisions of this subsection, shall provide for the continued operation of the National Center on Child Abuse and Neglect in accordance with section 5101(a) of this title for each of the fiscal years 1982 and 1983.

(3) If the Secretary determines, in fiscal year 1982 or 1983, to carry out any of the activities described in section 5101(b) of this title, the Secretary shall carry out such activites through the National Center on Child Abuse and Neglect.

(b) There is authorized to be appropriated to carry out this section $12,000,000 for each of the fiscal years 1982 and 1983. Of the amounts appropriated under this subsection for any fiscal year, not less than $2,000,000 shall be available to carry out title II of the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978 [42 U.S.C.A. § 5111 et seq.].

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(2)

No. 88-1181

In The

Supreme Court of the United States

October Term, 1988

CRYSTAL CUNNINGHAM Per Next Friend ROBERT RUBY CUNNINGHAM, and ASHLEY JOHNSON Per Next Friend, LARRY JOHNSON,

Petitioners,

vs.

HARRY J. BEAVERS, Superintendent of Schools Jacksonville Independent School District, MARY SUE BRUNO, Principal, Westside Kindergarten School, ROSA COOK, Teacher, Westside Kindergarten School, TONY BOLTON, Chairman, Jacksonville Independent School District Board of Trustees,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

(1) Was the Fifth Circuit correct in its holding that state tort and criminal remedies provide all the process that is due for excessive, unreasonable, and disproportionate public school corporal punishment, which does not rise to the level of substantive due process violation?

(2) Was the Fifth Circuit correct in its holding that corporal punishment is rationally related to a legitimate state purpose and does not violate the Equal Protection Clause of the Fourteenth Amendment?

(3) Was the Fifth Circuit correct in its holding that the Texas statute authorizing the use of corporal punishment does not violate the Equal Protection Clause or the Due Process Clause of the Fifth and Fourteenth Amendments?

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OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 858 F.2d 269 and is attached to Petitioners' Petition as Exhibit A at page A-1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("the Petition").

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Texas Codes Annotated, 1973 Revision, Penal Code, Vol. 1
Section 9.62, Educator-Student

"The use of force, but not deadly force, against a person is justified:

(1) if the actor is entrusted with the care, supervision, or administration of the person for a special purpose; and
(2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group."

COUNTERSTATEMENT OF THE CASE

Petitioners, Crystal Cunningham and Ashley Johnson, filed suit in the United States District Court for the Eastern District of Texas alleging violation of their Fifth

and Fourteenth Amendment substantive and procedural due process rights and for violation of the equal protection clause under 42 U.S.C. Section 1983, and under 42 U.S.C. Section 1985 for conspiracy to intimidate from testifying in federal court. Petitioners individually named and sued the Respondents, alleging that the teacher, principal, superintendent and chairman of the Board of Trustees violated the Petitioners' constitutional rights under 42 U.S.C. Section 1983 by the use of disciplinary corporal punishment. Petitioners' complaint alleged that Respondents' acts in administering corporal punishment were excessive, brutal, disproportionate to the circumstances, shocking to the conscience and constituted intentional disregard for Petitioners' rights and their physical and emotional well being. (*See* Petition, p. E-3)

On February 29, 1988, the District Court granted Respondents' Rule 12(b)(6) F.R.C.P., Motion to Dismiss for failure to state a claim on all counts, considering itself bound by Fifth Circuit precedent in regard to due process. *Coleman v. Franklin Parish Board*, 702 F.2d 74 (5th Cir. 1983); *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (*en banc*) *aff'd on other grounds*, 430 U.S. 651 (1977); *Woodard v. Los Fresnos*, 732 F.2d 1243 (5th Cir. 1984). (*See* Petition, p. C-2)

The equal protection claim was dismissed on the grounds that corporal punishment is rationally related to a legitimate state purpose. Various state pendent tort claims were dismissed with the above.

Petitioners perfected their appeal to the Court of Appeals for the Fifth Circuit in timely fashion. (*See* Petition, p. E-5) The appeal to the Fifth Circuit was premised

upon violation of the substantive due process liberty interest and the Equal Protection Clause.

In denying the liberty interest claim, the Court of Appeals for the Fifth Circuit stated that even if the force is unreasonable and/or disproportionate, the availability and sufficiency of state tort or criminal remedies are sufficient to afford due process to the student. The Fifth Circuit upheld the District Court's dismissal of the Equal Protection claim based on the Texas statute allowing corporal punishment, as the statute was rationally related to a legitimate state purpose.

REASONS FOR DENYING THE WRIT

I. STATE TORT AND CRIMINAL REMEDIES PROVIDE ALL THE PROCESS THAT IS DUE FOR EXCESSIVE, UNREASONABLE AND DISPROPORTIONATE PUBLIC SCHOOL CORPORAL PUNISHMENT, WHICH DOES NOT RISE TO THE LEVEL OF A SUBSTANTIVE DUE PROCESS VIOLATION.

This Court has had occasion to consider the constitutional aspects of corporal punishment in the case of *Ingraham v. Wright*, 430 U.S. 651 (1977). The facts of *Ingraham v. Wright* are similar to the facts before the Court in that the petitioners filed their suit under 42 U.S.C. Sections 1981 through 1988 for damages, alleging violation of their constitutional rights resulting from their subjection to disciplinary corporal punishment. Ingraham was subjected to more than twenty licks with a paddle, causing a hemotoma requiring medical attention and keeping him out of school for several days. Andrews was struck on his arm, depriving him of the full use of his

arm for a week. In *Ingraham v. Wright*, this Court expressly stated that it had no occasion to consider "whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause", 430 U.S. 651, 679, n.47 (1977). The Court refused certiorari as to whether "the infliction of severe corporal punishment upon public school students [is] arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment[.]", *Id.* at 659, n.12. Therefore, the Fifth Circuit refusal "to look at each individual incidence of punishment to determine if it had been administered arbitrarily or capriciously" was left to stand. *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976) (en banc), *aff'd on other grounds*, 430 U.S. 651 (1977). The Fifth Circuit stated:

> We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular incidence of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child.

Id. at 917.

This Court recognized a liberty interest to be free from bodily restraint and punishment without due process of law, thus recognizing a right to procedural due process in the application of corporal punishment in public schools, although recognizing that "there is a 'de

minimis' level of imposition within which the Constitution is not concerned". *Ingraham*, 430 U.S. 651, 674. However, this Court did not recognize a substantive liberty interest with respect to the application of corporal punishment. In the procedural realm, the traditional common law remedies were found to be "fully adequate to afford due process". *Id.* at 673. This Court's holding that "common-law constraints will . . . effectively remedy and deter" the anticipated "low incidence of abuse", *Ingraham, supra*, 670, 678, n.46, strongly suggests the contrary conclusion that excessive corporal punishment is not an element of the substantive content of the liberty interest. The adequacy of available post-corporal punishment state tort remedies to address any abuses that do occur supports this conclusion, just as this Court found these remedies to be adequate to satisfy the procedural due process requirement specified in *Ingraham*.

The Fifth Circuit Court of Appeals' refusal to review individual incidents of corporal punishment keeps the federal judiciary from being unnecessarily embroiled in local matters of school discipline. As this Court clearly stated in *Paul v. Davis*, 424 U.S. 693, 701 (1976), the Fourteenth Amendment should not become "a font of tort law". This Court's concern was reiterated in *Daniels v. Williams*, 474 U.S. ___, 106 S.Ct. 662 (1986), when this Court stated its concern that elevating simple torts to the level of constitutional deprivations would trivialize the Constitution.

This Court in *Ingraham* recognized that corporal punishment has evolved over the history of this country as a privilege to be inflicted reasonably where applicable in a public school, and that it was reviewing the legislative

judgment "rooted in history and reaffirmed in the laws of many States, that corporal punishment serves important educational interests." *Ingraham*, 430 U.S. at 682. This Court implied that it intended the review of corporal punishment to be left on a local level and not rise to the level of federal review.

> Assessment of the need for, and the appropriate means of maintaining school discipline is committed generally to the discretion of school authorities subject to state law. "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines School District*, 393 U.S. 503, 507 (1969).

Id. at 682-683.

The Fifth Circuit, in the decision before this Court, stated that if the corporal punishment was unreasonable and/or disproportionate to the offense, the Plaintiffs would be entitled to relief under Texas common law. (*See* Petition A-8) In *Parratt v. Taylor*, 451 U.S. 527, 545 (1981), this Court held that the Nebraska state tort procedures provided sufficient remedies to persons who had suffered tortious loss at the hands of the state, and cautioned against finding in "every alleged injury which may have been inflicted by a state official acting under the 'color of law' a violation of the Fourteenth Amendment cognizable under Section 1983."

Texas laws provide sufficient "post-punishment remedies" to the aggrieved student. In looking to the laws of the State of Texas, it has been recognized by the Fifth Circuit Court of Appeals and Texas courts that Texas provides a student with sufficient common law

remedies in the form of criminal and tort remedies for the use of excessive or unreasonable punishment or force. *Woodard, supra; Hopkins v. Spring Independent School District,* 736 S.W.2d 617 (Tex. 1987).

In view of this Court's opinion set forth in *Ingraham v. Wright,* the Fifth Circuit correctly concluded that the corporal punishment inflicted upon Crystal Cunningham and Ashley Johnson did not create a substantive due process violation. The punishment of Ashley Johnson and Crystal Cunningham was certainly no more severe than that of the petitioners in *Ingraham v. Wright.* If this Court is inclined to impose a substantive due process requirement on the administration of corporal punishment, under the facts as presented in Petitioners' Petition for Writ of Certiorari, it was presented no less compelling a set of facts in *Ingraham v. Wright* when the same question was presented and certiorari denied. Therefore, the opinion of the Fifth Circuit in this case, with regard to substantive due process should be allowed to stand.

Additionally, in affirming the opinion of the Fifth Circuit that the facts of this case do not rise to the level of due process, the Petitioner has no rights for which he has been deprived under the First Amendment and the Fifth Amendment of the Constitution. Under the jurisprudence set by this Court, it is apparent that the allegations of Petitioners, as plead, have alleged no facts and therefore can prove no set of facts in support of their claims for deprivation of substantive due process that would provide a basis for relief under Section 1983.

II. CORPORAL PUNISHMENT IS RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fifth Circuit correctly denied Petitioners' Equal Protection claim. Although this Court has upheld the common law privilege of inflicting corporal punishment on school children as a means of discipline in education, Petitioners would have the Court reverse its holding in light of their statements and studies cited in Petitioners' Petition.

In order to establish a claim under Section 1983, Petitioners are required to allege specific facts to demonstrate Petitioners have been deprived or will be deprived of a right secured by the Constitution or laws of the United States and that such deprivation was caused by a person acting under the color of law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 1440 (1970). In that connection, in seeking to establish a claim under Section 1983 for deprivation of equal protection of the laws, it must be remembered that the Equal Protection Clause of the Fourteenth Amendment, in and of itself, confers no substantive rights and creates no substantive liberties. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

The purpose and function of the Equal Protection Clause is to simply act as a limit on state legislative action against arbitrary or invidious discriminatory classifications or distinctions. Petitioners have failed to allege specific facts demonstrating that Respondents have, pursuant to some improper classification or distinction,

through their conduct, caused the denial of equal protection of the laws in connection with a specifically identifiable federal constitutional right or guarantee. Petitioners' allegations regarding denial of equal protection are vague and conclusory statements which are insufficient to state a claim under Section 1983. Additionally, Petitioners' allegations fail to allege or identify any improper classification under the state laws set forth therein.

Petitioners cannot prevail under the "strict scrutiny" test of an equal protection violation, without the denial of a fundamental right. (*See Rodriguez, supra; Palko v. Connecticut*, 302 U.S. 319 (1937). Petitioners have recognized the fact that no cases have ever held that children are a suspect class. (*See* Petitioners' Brief to the Fifth Circuit p. 16) The Fifth Circuit likewise declined to hold that children are a suspect class. (*See* Petition, A-9). Next, Petitioners seek to create an "intermediate" scrutiny class making children an "at risk" group. The Fifth Circuit has correctly held that intermediate scrutiny has only been applied in classifications based on gender, legitimacy or alienage. *Plyler v. Doe*, 457 U.S. 496 (1981); *Craig v. Boren*, 429 U.S. 190 (1976), *reh'g denied*, 429 U.S. 1124 (1977); *Lalli v. Lalli*, 439 U.S. 259 (1978). Therefore, the Petitioner is left with an equal protection review on a "rational basis" test which provides the minimum level of judicial evaluation and review of legislation challenged on equal protection grounds.

> In the equal protection context, if the state's purpose is found to be legitimate, state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship not difficult to establish.

Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 882 (1983), *reh'g denied*, 471 U.S. 1120 (1985). An equal protection challenge will not prevail so long as "the question of rational relationship is 'at least debatable' ". *Id.* If the evaluation of a legislation reveals any conceivable state purpose that could be considered to be served by a classification, it must be upheld. *McGowan v. Maryland*, 366 U.S. 420 (1961).

In applying the rational basis test to the legislative relationship between the statute and laws of this state permitting corporal punishment, this Court should rely heavily on the evaluations of the goals and objectives of corporal punishment stated in *Ingraham v. Wright*, 525 F.2d at 916. The Fifth Circuit explained:

> Certainly, maintenance of discipline and order in public schools is a prerequisite to establishing the most effective learning atmosphere and as such is a proper objective for state and school board regulation. Without the existence of disciplinary sanctions for misbehavior, students who desire to learn would be deprived of their right to an education by the more disruptive members of their class.

Id. at 916-17. Although Petitioners cite empirical research disagreeing with the benefit of the use of corporal punishment in maintaining such discipline, Respondents could cite the Court to authorities who would hold otherwise. However, in light of the standard that a rational relationship to a legitimate state purpose is all that is needed to uphold legislation, Petitioners' cited studies should not be sufficient to cause this Court to change its position that corporal punishment is not violative of equal protection. The Fifth Circuit has correctly held that the invalidation of corporal punishment would require

this Court to ignore its decision in *Ingraham v. Wright* which presupposes that there is a rational relationship between corporal punishment and maintaining discipline in public schools.

III. THE TEXAS STATUTE AUTHORIZING CORPORAL PUNISHMENT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OR THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The Texas Penal Code provides authority for the use of corporal punishment:

> The use of force, but not deadly force, against a person is justified:
>
> 1. If the actor is entrusted with the care, supervision, or administration of the person for a special purpose; and
>
> 2. When and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group.

TEX. PENAL CODE ANN. Section 9.62 (Vernon 1973). The Fifth Circuit correctly held that, based on the foregoing discussion of the application of the "rational basis" test, the Texas legislature had a rational basis for its legislation in that this statute is rationally related to the legitimate state purpose of maintaining discipline in public schools, and therefore, is not violative of the Due Process or Equal Protection Clauses of the Fourteenth Amendment.

The Fifth Circuit also correctly held "that the concerns voiced by [Petitioners] and the wealth of empirical

research they bring to the attention of the Court are more properly brought to the attention of the Texas legislature." (*See* Petition, A-11).

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF AMICI CURIAE

The National Committee for Prevention of Child Abuse ("NCPCA"), a non-profit organization established in 1972, is dedicated to the prevention of child abuse in all forms. NCPCA works through its chapters in all 50 states

and the District of Columbia to promote policies and programs designed to reduce violence against children. Child abuse prevention programs, such as those supported by NCPCA, teach children and parents that hitting is wrong, that it is against the law when severe, and that it is an ineffective way to solve problems. NCPCA has moved to intervene in this case because when children in Texas attend school, their lessons include seeing a school official hit a child (or themselves being hit by an adult). Thus the authority of the state asserts that hitting is an accepted form of interaction. NCPCA believes that it is essential that we promote the clearer standard that physical punishment, like other forms of abuse, is not a socially acceptable practice and should not be legally permitted. NCPCA opposes the use of corporal punishment in schools

and custodial settings and supports the use of appropriate disciplinary alternatives, and further supports the adoption of state and local legislation to prohibit corporal punishment in schools and all other institutions, public or private, where children are cared for or educated.

The American Medical Association ("AMA") is a private, voluntary, nonprofit organization of physicians. It was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, it is the largest health care organization in the United States, representing the interests of over 280,000 physicians and medical students.

The AMA has examined the medical, psychological, educational and social consequences of corporal punishment in the schools and has found

that there are serious detrimental effects. Moreover, research indicates that corporal punishment is not needed to maintain order in the schools. Consequently, the AMA opposes the use of corporal punishment in all educational institutions and has called for its abolition.

Amici Curiae respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on October 26, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 858 F.2d 269 (5th Cir. 1988), and is reprinted in the appendix to the Petition for a Writ of Certiorari filed in the above entitled proceeding, p. A-1.

The opinion of the United States District Court for the Eastern District of Texas, Tyler Division (Justice J.) has not been reported. It is reprinted in the appendix to the Petition for a Writ of Certiorari filed in the above entitled proceeding, p. C-1.

JURISDICTION

Amici Curiae adopt the statement of Jurisdiction as presented in the Petition for a Writ of Certiorari filed in the above entitled case.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Amici Curiae adopts and incorporates herein the Constitutional Provisions, Statutes and Regulations Involved reprinted in the Petition for a Writ of Certiorari filed in the above entitled proceeding.

STATEMENT OF THE CASE

QUESTIONS PRESENTED

Amici Curiae adopt the Questions Presented and Statement of the Case as presented in the Petition for a Writ of Certiorari filed in the above entitled case.

REASONS FOR GRANTING THE WRIT

I. IN INGRAHAM V. WRIGHT THE COURT LEFT OPEN WHETHER CORPORAL PUNISHMENT MAY VIOLATE A CHILD'S FOURTEENTH AMENDMENT RIGHT TO LIBERTY.

Twelve years ago, in Ingraham v. Wright, 430 U.S. 654 (1977), the Court was presented with a challenge to a Florida statute and certain school board regulations that permitted corporal punishment in public schools. Petitioners sued the principal, two assistant principals and the superintendent of the county school system under 42 U.S.C. §§ 1981-1988. Ingraham 430 U.S. at 654-655. Petitioners alleged that Appellants'

use of corporal punishment violated their constitutional rights under the Eighth and Fourteenth Amendments. Ingraham, 430 U.S. at 654. The Court granted certiorari on the questions of whether the corporal punishment was cruel and unusual punishment under the Eighth Amendment, and whether the corporal punishment violated Petitioners' procedural due process rights under the Fourteenth Amendment. Ingraham, 430 U.S. at 660. The Court found for Appellants on both issues and held: (1) that the Eighth Amendment does not protect school children, Ingraham, 430 U.S. at 672 and 684, and; (2) that the children's procedural due process rights were adequately protected by "Florida's preservation of common-law constraints and remedies." Ingraham, 430 U.S. at 684.

The Ingraham Court did not, however, foreclose all Federal

Constitutional issues associated with corporal punishment of children. To the contrary, it specifically stated:

> ... at least where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated. [Footnote omitted]

Ingraham, 430 U.S. at 675.

As described below, five different Circuit Courts have defined the parameter of those interests in four different ways. Because Petitioners were injured in a Circuit that defines these rights narrowly their complaint was dismissed. They do not have the liberty interests that would be recognized in other Federal Circuits. This Petition asks the Court to return to the question left open in Ingraham; to define the impact of the Fourteenth Amendment's guarantee of

liberty as it limits a school official's freedom to hit children.

II. THE CIRCUIT COURTS ARE SPLIT ON WHETHER CORPORAL PUNISHMENT MAY VIOLATE A CHILD'S FOURTEENTH AMENDMENT RIGHT TO LIBERTY AND, IF SO, AT WHAT POINT.

Without the guidance of the Supreme Court, the five Circuit Courts that been presented within this issue[1/] have developed four different standards for determining a constitutional deprivation of a child's Fourteenth Amendment right to liberty. While four Circuit Courts, applying varying standards, have recognized that corporal punishment may violate a

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1/ These circuits are: the Fifth Circuit, Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976) (en banc); the Fourth Circuit, Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980); the Tenth Circuit, Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987), rehearing and rehearing en banc denied (1988), cert denied, 108 S.Ct. 1220 (1988); the Third Circuit, Metzger v. Osbeck, 841 F.2d 518 (3rd Cir. 1988), and; the Eighth Circuit, Wise v. Pea Ridge School District, 855 F.2d 560 (8th Cir. 1988)

child's Fourteenth Amendment right to liberty, the Fifth Circuit has consistently held that corporal punishment never gives rise to such a claim, no matter how egregious.

A child's Fourteenth Amendment right to liberty is never violated by corporal punishment in the Fifth Circuit even where a six year old's head wound from his teacher's hitting him on the head with a coffee mug required stitches, Coleman v. Franklin Parish School Board, 702 F.2d 74, 75 (5th Cir. 1983). In Ingraham, 525 F.2d at 917, the Fifth Circuit held that "having determined that corporal punishment itself and corporal punishment as circumscribed in Policy 5144 is not arbitrary, capricious, or unrelated to legitimate educational goals, we refused to look at each individual instance of punishment to determine if it has been administered

arbitrarily or capriciously." This rule of law is now firmly established in that Circuit. See Cunningham v. Beavers, 885 F.2d 269 (5th Cir. 1988), Woodard v. Los Fresnos Independent School District, 732 F.2d 1243 (5th Cir. 1984) and Coleman v. Franklin Parish School Board, 702 F.2d 74 (5th Cir. 1983)

The Third and Eighth Circuits have adopted a test that is the least restrictive of all the Circuits. In Metzger v. Osbeck, 841 F.2d 518 (3rd Cir. 1988) the Third Circuit held that "[a] decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute an invasion of the child's Fifth Amendment liberty interest in his personal security and a violation of substantive due process prohibited by the Fourteenth Amendment." Metzger, 841 F.2d at 510. The Metzger court

adopted a balancing test used by the Second Circuit in another context:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id., quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir.), cert. denied, 414 U.S. 1033 (1972).

The Eighth Circuit followed the lead of the Third Circuit and adopted a test also taken from the context of a policy brutality case. Under that test, the court considers:

> 1) the need for the application of corporal punishment; 2) the relationship between the need and the amount of punishment administered; 3) the extent of injury inflicted; and 4) whether the punishment was administered in a good faith

> effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm.

Wise, 855 F.2d at 564.

Two other circuits have developed a standard in the middle ground between the Fifth Circuit's draconian approach and the Third and Eighth Circuit's more permissive threshold test. The Fourth Circuit has held that a child's Fourteenth Amendment right to liberty is violated when "the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." Hall, 621 F.2d at 613. This standard is the same standard used in police brutality cases. Id.

The Tenth Circuit has adopted the approach of the Fourth Circuit, i.e., applying the same standard as in police brutality case, but rejected the Fourth Circuit's requirement of "malice or sadism." Garcia, 817 F.2d at 655 n.7. So in the jurisdiction of the Garcia court, a child's Fourteenth Amendment right to liberty may be violated if "'the force applied caused injury so severe, was so disproportionate to the need presented, and... amounted to a brutal and inhumane abuse of official power literally shocking to the conscience[.]," Id., quoting Hall, 621 F.2d at 613.

These varied standards have a very practical significance to Crystal Cunningham and Ashley Johnson. The Fifth Circuit's absolute bar to claims of violations of a child's Fourteenth Amendment right to liberty required

dismissal of Petitioner's complaint. However, this same complaint would have, in all likelihood, survived a motion to dismiss in the Third or Eighth Circuits where the courts may decide on the facts whether such liberty interests have been violated. In Metzger, 841 F.2d 518 the Eighth Circuit left to the jury to decide whether the coach's use of choke-hold on a junior high school student, that caused the student to loose consciousness, constituted unreasonable force. Metzger, 841 F.2d at 521. In Wise, 855 F.2d 560, based on the specific facts presented, the Eighth Circuit upheld an order granting summary judgment. Wise, 855 F.2d at 562-563. Even if Petitioners ultimately lose their law suit, they are at least entitled to have a court--or a jury--in the Fifth Circuit assess the merits of their cases as they would

be if their complaints were brought in the Eighth or Third Circuits.

III. JUDICIAL UNIFORMITY IS ESPECIALLY IMPORTANT BECAUSE OF THE LARGE NUMBER OF INCIDENCES OF CORPORAL PUNISHMENT AND THE WIDE VARIATION AMONG THE STATES IN NUMBER OF THESE INCIDENCES.

Judicial uniformity is particularly desirable in the context of protecting individual rights. Here, the chaos of the Circuit Courts' decisions is magnified by the wide and varied use of corporal punishment as a disciplinary tool from state to state, and within some states, from school district to school district. According to the U.S. Department of Education's Office of Civil Rights, and data analyzed by the National Coalition of Advocates for Students, in 1986 1,993,895 students were corporally punished by teachers and principals, out of a national school population of

141,156,285.[2] What is particularly abhorrent is the wide disparity of the rate of corporal punishment of black and hispanic students, compared to the rate of corporal punishment of white students, particularly in some of the southern states.

The one in twenty students who suffered this often traumatic experience were not evenly distributed throughout the United States or among racial groups within each of the states. Texas school children were 50% more likely than the national average to suffer corporal punishment. Texas has the seventh highest rate of such punishment.[3] In some Texas

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[2] This does not represent the number of incidents of corporal punishment, because it does not reflect the repeated use of corporal punishment against any one child. Statistics on repeat beatings are not available.

[3] The six states with the highest total corporal punishment rates are: Arkansas (13.71%), Mississippi (10.33%), Alabama (10.31%), Tennessee

districts, one in three children (six times the national average) suffer corporal punishment each year. Three school districts in Texas appear on the list of the twenty school districts out of a national sample, with the largest difference between black and white corporal punishment rates.[4/] Among the twenty school districts in Texas with the highest rates of total corporal punishment the range is from 36.78% (Diboll Independent School District in Diboll, Texas) to 14.41% (Waxahachie Independent School District in Waxahachie, Texas). The ratio of the rate of corporal punishment of black to white students, in the twenty

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(8.76%), Oklahoma (7.95%) and Georgia (7.81%).

4/ Arizona and Alabama each also have two school districts in this "top twenty" list and Georgia has the dubious honor of featuring four school districts on this list. The other states represented are: Florida (two districts) and Tennessee, Mississippi, Louisiana, Indiana and Oklahoma, with one each.

districts with the highest disparity, ranges from 2.31 to 1.78.

IV. CHILDREN AS A GROUP HAVE UNIQUE CHARACTERISTICS THAT REQUIRE JUDICIAL PROTECTION.

In the twelve years since Ingraham was decided, one of the foundations of the Court's defense of corporal punishment -- public and professional opinion -- has seriously eroded. The Court noted there that "[o]pinion surveys taken since 1970 have consistently shown a majority of teachers and the general public favoring moderate use of corporal punishment in lower grades." Ingraham, 430 U.S. at 661 n.17. This is simply no longer true. National organizations of professionals and experts involved in child care now favor abolition of corporal punishment in schools. For example, the National Education Association has stated that it believes "corporal punishment should

not be used as a means of disciplining students." National Education Association of the United States of America, Resolutions, Legislative Program, and New Business Resolutions, § C-18 (1987-1988). The American Medical Association, the American Academy of Pediatrics, the American Psychological Association and the American Bar Association have issued a joint statement opposing the use of corporal punishment in schools.5/ The number of organizations that have taken

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5/ Other national organizations that oppose the use of corporal Punishment in schools include:

> American Civil Liberties Union, American Humanist Association, American Orthopsychiatric Association, Association of Junior Leagues, Child Welfare League of America, National Association of School Psychologists, National Association of Social Workers, National Committee for Citizens in Education, National Mental Health Association, and National PTA.

a stand on this issue shows its importance, and the stand they have taken -- against the use of corporal punishment in schools -- evidences a national trend away from accepting corporal punishment as a disciplinary tool that had only begun when Ingraham was before the Court.

When Ingraham, was decided, only two states,[6] New Jersey and Massachusetts, expressly prohibited corporal punishment. Now, eleven states[7] prohibit its use, two states are contemplating its prohibition,[8] and in most of the states which allow individual school boards to develop

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6/ The Court was relying on legislation in place in 1976.

7/ The eleven states are: California; Maine; Massachusetts; Nebraska; New Hampshire; New Jersey; New York; Rhode Island (Corporal punishment prohibited by each school district); Vermont; and Wisconsin.

8/ Michigan and Ohio have bills pending that would prohibit corporal punishment.

their own policy, at least some of those school boards prohibit its use.[9/] This movement clearly reflects a shift in public and professional attitudes toward the elimination of corporal punishment.

The issues raised by Petitioners are not abstract or theoretical. Corporal punishment literally touches every child in a school where it is administered. It equally affects those who are its direct victims, those who are witnesses to its administration, and those who merely feel its threat. It is most imperative to these children that the Court provide some standard by which the lower courts may uniformly assess specific incidents of corporal

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9/ These states are: Alabama; Alaska; Georgia; Idaho; Kansas; Kentucky; Maryland; Mississippi; Nevada; New Mexico; and Wyoming.

punishment for constitutional violations.

V. CHILDREN AS A GROUP HAVE UNIQUE CHARACTERISTICS THAT REQUIRE JUDICIAL PROTECTION.

Justice Stone's "Footnote Four" in United States v. Carolene Products Co., 304 U.S. 144 (1938) establishes the basis for a high level of judicial scrutiny of state statutes that are challenged as violating the Bill of Rights. After stating that economic legislation should be struck only if it has no "rational basis," Carolene Products Co., 304 U.S. at 152, in Footnote Four, Justice Stone distinguishes other areas that may demand a more exacting scrutiny, including

> whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may

> call for a correspondingly more searching juridical inquiry.

Carolene Products Co., 304 U.S. at 152-153 n.4. The judicial branch is uniquely responsible for protecting the constitutional rights and interests of those who are denied access to or a voice in the political process. Different groups are afforded varying levels of protection from violations of their constitutional rights depending often on the discrimination, and lack of access to the political process, members of the group have historically suffered. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 685-686 (1973) (Comparing history of discrimination against women and history of discrimination against blacks), Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-176 (1972) (Tracing the history of

discrimination against illegitimate children).

Justice Stone's analysis is clearly relevant here, and under it the Court has an obligation to show a special sensitivity to possible violation of children's Constitutional rights. Without the right to vote, children are powerless in the political process. They have no access to legislators, and no means through which to make their needs heard or to have their rights and interests protected. They are "perennial losers in the political struggle." L. Tribe, American Constitutional Law, p. 1002 (1978). Children are uniquely vulnerable to decisions made by others ostensibly in their best interests. Corporal punishment epitomizes this vulnerability. Legislators acceding to the will of a majority of adults have not heard the children's protests, and

they cannot because legislators can only hear the voices of the voting public. It is up to the Court to represent the interests and protect the rights of non-voting children by determining how far corporal punishment may go before it transgresses those children's right to be free from "unjustified intrusions on personal security." Ingraham, 430 U.S. at 674, 97 S.Ct. at 1413.

CONCLUSION

For the reasons stated herein and in the Petition for a Writ of Certiorari filed in the above entitled proceedings, the petition for certiorari should be granted.

Respectfully Submitted,

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